THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

LOUIS M. LOEB, *President* | PAUL B. DE WITT, *Executive Secretary* | ROGER BRYANT HUNTING, *Secretary*

THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 13 | FEBRUARY 1958 | *Number* 2

Association Activities

AT THE January Stated Meeting interim reports were made by Alexander Lindey, Chairman of the Committee on Art, and Richard H. Wels, Chairman of the Special Committee on Improvement of Family Law. Mr. Wels' report is published in this issue of THE RECORD.

The Association voted to lay on the table consideration of amendments to the Constitution relating to dues and certain classifications of members.

Reports of the Special Committee on Wiretapping and Eavesdropping Legislation, Whitney North Seymour, Chairman, and the Committee on the Bill of Rights, Kenneth W. Greenawalt, Chairman, were presented. The following resolutions of the Special Committee were adopted:

RESOLVED, that The Association of the Bar of the City of New York supports the amendment of Section 345-a of the Civil Practice Act to read as follows:

"§345-a. **Eavesdropping evidence inadmissible.**

Evidence obtained by any act of eavesdropping, as defined in section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any hearing, or any civil or criminal action or proceeding, provided, however, that in any criminal action or proceeding in which an essential element of the crime charged is an act of

eavesdropping as defined in section seven hundred thirty-eight of the penal law or an act in violation of section eight hundred thirteen-b of the code of criminal procedure, or the use or attempt to use information obtained as a result of any such act, then such information or evidence obtained by any such act shall be admissible in evidence."

RESOLVED, that The Association of the Bar of the City of New York favors legislation which would require *ex parte* orders in connection with the use of equipment for eavesdropping by law enforcement officers where the equipment is to be maintained for any appreciable period of time.

The following resolutions proposed by the Committee on the Bill of Rights were adopted, with the direction that the Committee insure that the proposed addition to the unconsolidated laws would permit disclosure of confidential communications in disciplinary actions against lawyers:

RESOLVED, that The Association of the Bar of the City of New York supports the amendment of section 353 of the Civil Practice Act to read as follows:

"§353. Communications between attorney and client not to be disclosed.

An attorney or counselor at law shall not disclose, or be allowed to disclose, a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor, or any other person who obtains without the knowledge of the client evidence of such communication or advice, disclose, or be allowed to disclose, any such communication or advice."

RESOLVED, that The Association of the Bar of the City of New York supports the enactment into law of the following section, to be added to the unconsolidated laws:

"Communications between attorney and client not to be disclosed.

An attorney or counselor at law shall not disclose, or be allowed to disclose, a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor, or any other person who obtains without the knowledge of the client evidence of any such communication or advice, disclose, or be allowed to disclose, nor the client be compelled to disclose, any such communication or advice given thereon in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of such a communication made by a client to his attorney or counselor at law, or of the advice given by the attorney or counselor thereon, obtained through the attorney or counselor or any clerk, stenog-

rapher or other person employed by him, or through any other person who obtains without the knowledge of the client such evidence, and evidence obtained through or resulting from information so obtained, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

At 8:00 P.M. Presiding Justice Bernard Botein addressed the Association on the subject, "Our Courts Face the Future." Justice Botein's address was under the auspices of the Committee on Post-Admission Legal Education, Ernest A. Gross, Chairman. The address will be published in the March issue of THE RECORD.

THE WORK of the Special Committee on Atomic Energy, Oscar M. Ruebhausen, Chairman, has been organized under four subcommittees: Classification and Secrecy; Insurance and Indemnity; International Problems; and State and Local Regulation. In this issue of THE RECORD there is published a paper presented by the Secretary of the Committee to the annual conference of the Atomic Industrial Forum Inc.

SURROGATE S. SAMUEL DI FALCO spoke before the Section on Wills, Trusts and Estates, Joel Irving Friedman, Chairman, on "Observations on the Judicial Supervision of Estates." At the same meeting Edward R. Finch, Jr. reviewed recent decisions.

WILLIAM H. TIMBERS, formerly General Counsel of the Securities and Exchange Commission, spoke before the Section on Litigation, Edward C. McLean, Chairman, on "S.E.C. Litigation—Before the Commission and the Courts."

A JOINT MEETING of the Sections on Banking, Corporation and Business Law, Charles H. Willard, Chairman, and on Administrative Law and Procedure, Leslie H. Arps, Chairman, had as guest speakers Byron D. Woodside, Director, Division of Cor-

poration Finance, S.E.C., and Arthur H. Dean. The topic for the meeting was "Mergers, Consolidations and the S.E.C." with particular emphasis on Rule 133 and Section 3(a) (9) of the Securities Act of 1933.

THE ASSOCIATION'S Photographic Exhibition will open on March 20, 1958. The Art Committee, Alexander Lindey, Chairman, is making a drive to obtain as many exhibitors as possible. As the exhibit will be one by lawyers and not by professional photographers, emphasis will be placed on the number of contributors rather than on the quality of the contributions. It is only by broadness of representation that the exhibit can be of real service to the Association and its members.

A JOINT meeting of the Section on Trade Regulation, Edgar E. Barton, Chairman, and the Committee on Trade Regulation, Laurence I. Wood, Chairman, was held to present speakers from a group of foreign experts on the antitrust laws who are visiting the United States pursuant to the program of the Organization for European Economic Cooperation (O.E.E.C.). Nations represented were Belgium, Canada, Denmark, France, Germany, Netherlands, Norway, Sweden and the United Kingdom. The speakers discussed the main antitrust policy issues arising under the laws of these countries. The meeting was held in cooperation with the Federal Bar Association.

THE FOLLOWING publishers of Law Lists and Legal Directories have received Certificates of Compliance from the Standing Committee on Law Lists of the American Bar Association for their 1958 editions:

Commercial Law Lists

A. C. A. LIST
Associated Commercial Attorneys List
165 Broadway
New York 6, New York

THE AMERICAN LAWYERS QUARTERLY
The American Lawyers Company
1712 N.B.C. Building
Cleveland 14, Ohio

THE B. A. LAW LIST
The B. A. Law List Company
759 No. Milwaukee Street
Milwaukee 2, Wisconsin

THE CLEARING HOUSE QUARTERLY
Attorneys National Clearing House Co.
3539 Hennepin Avenue
Minneapolis 8, Minnesota

THE COLUMBIA LIST
The Columbia Directory Company, Inc.
320 Broadway
New York 7, New York

THE COMMERCIAL BAR
The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

THE C-R-C ATTORNEY DIRECTORY
The C-R-C Law List Company, Inc.
15 Park Row
New York 38, New York

FORWARDERS LIST OF ATTORNEYS
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

THE GENERAL BAR
The General Bar, Inc.
36 West 44th Street
New York 36, New York

THE INTERNATIONAL LAWYERS
International Lawyers Company, Inc.
33 West 42nd Street
New York 36, New York

THE MERCANTILE ADJUSTER
The Mercantile Adjuster Publishing Company
7109 Greenwood Avenue
Seattle 24, Washington

THE NATIONAL LIST
The National List, Inc.
122 East 42nd Street
New York 17, New York

RAND MCNALLY LIST OF BANK RECOMMENDED ATTORNEYS
Rand McNally & Company
P. O. Box 7600
Chicago 80, Illinois

WRIGHT-HOLMES LAW LIST
Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Law Lists

AMERICAN BANK ATTORNEYS
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

THE AMERICAN BAR
The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

THE BAR REGISTER
The Bar Register Company, Inc.
One Prospect Street
Summit, New Jersey

CAMPBELL'S LIST
Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

INTERNATIONAL TRIAL LAWYERS
Directory Publishers, Inc.
84 Cherry Street
Galesburg, Illinois

THE LAWYERS DIRECTORY
The Lawyers Directory, Inc.
830 Ingraham Building
Miami 32, Florida

MARKHAM'S NEGLIGENCE COUNSEL
Markham Publishing Corp.
Markham Building
66 Summer Street
Stamford, Connecticut

RUSSELL LAW LIST
Russell Law List
10 East 40th Street
New York 16, New York

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY
Martindale-Hubbell, Inc.
One Prospect Street
Summit, New Jersey

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS
Alfred M. Best Company, Inc.
75 Fulton Street
New York 38, New York

HINE'S INSURANCE COUNSEL
Hine's Legal Directory, Inc.
P.O. Box 71
Professional Center Building
Glen Ellyn, Illinois

THE INSURANCE BAR
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

THE UNDERWRITERS LIST OF TRIAL COUNSEL
Underwriters List Publishing Company
308 East Eighth Street
Cincinnati 2, Ohio

Probate Law Lists

THE PROBATE COUNSEL
Probate Counsel, Inc.
First National Bank Building
Phoenix, Arizona

SULLIVAN'S PROBATE DIRECTORY
Sullivan's Probate Directory, Inc.
84 Cherry Street
Galesburg, Illinois

State Legal Directories

The following state Legal Directories published by
The Legal Directories Publishing Company
1072 Gayley Avenue, Los Angeles 24, California:

Alabama and Mississippi Legal Directory

Arkansas and Louisiana Legal Directory

Carolinas and Virginias Legal Directory

Delaware-Maryland and New Jersey Legal Directory

Florida and Georgia Legal Directory

Illinois Legal Directory

Indiana Legal Directory

Iowa Legal Directory

Kansas Legal Directory

Kentucky and Tennessee Legal Directory

Minnesota—Nebraska, North Dakota and South Dakota Legal Directory

Missouri Legal Directory

Mountain States Legal Directory (for the States of Colorado, Idaho, Montana, New Mexico, Utah and Wyoming)

New England Legal Directory

New York Legal Directory

Ohio Legal Directory

Oklahoma Legal Directory

Pacific Coast Legal Directory (for the States of Arizona, California, Nevada, Oregon and Washington)

Pennsylvania Legal Directory

Texas Legal Directory

Wisconsin Legal Directory

Foreign Law Lists

BUTTERWORTHS EMPIRE LAW LIST
Butterworth & Co. (Publishers) Ltd.
88 Kingsway
London, W. C. 2, England

CANADIAN LAW LIST
Cartwright & Sons, Ltd.
2081 Yonge Street
Toronto 7, Ontario, Canada

THE INTERNATIONAL LAW LIST
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London, W. C. 2, England

KIME'S INTERNATIONAL LAW DIRECTORY
Kime's International Law Directory, Ltd.
102-A Southampton Row
London, W. C. 1, England

The Calendar of the Association for February and March

(As of January 31, 1958)

February 1	Annual Meeting of New York State Bar Association
February 3	Dinner Meeting of Committee on Professional Ethics
	Meeting of Section on Banking, Corporation and Business Law
	Meeting of Committee on State Legislation
	Dinner Meeting of Committee on the Municipal Court of the City of New York
February 4	Dinner Meeting of Committee on Copyright
	Meeting of Entertainment Committee
	Meeting of Committee on Labor and Social Security Legislation
February 5	Dinner Meeting of Executive Committee
	Meeting of Section on Wills, Trusts and Estates
February 6	Dinner Meeting of Committee on Admiralty
	Dinner Meeting of Committee on Administrative Law
	Meeting of Committee on International Law
February 11	Meeting of Committee on the Domestic Relations Court
	Meeting of Committee on State Legislation
	Dinner Meeting of Committee on Federal Legislation
	Dinner Meeting of Committee on Courts of Superior Jurisdiction
February 13	Meeting of Section on Trade Regulation
	Dinner Meeting of Committee on Trade Marks and Unfair Competition
	Meeting of Committee on Foreign Law
	Dinner Meeting of Committee on the Bill of Rights
February 17	Meeting of Library Committee
	Meeting of Section on Labor Law
	Dinner Meeting of Committee on Medical Jurisprudence
	Meeting of Committee on Arbitration
February 18	Meeting of Section on Taxation
	Meeting of Committee on State Legislation
	Dinner Meeting of Committee on Insurance Law

February 19 Meeting of Committee on Admissions

February 25 Meeting of Committee on State Legislation

February 26 Meeting of Section on Litigation
Dinner Meeting of Committee on Legal Aid

March 3 Meeting of Section on Jurisprudence and Comparative Law
Dinner Meeting of Committee on Professional Ethics

March 4 Meeting of Section on Taxation
Meeting of Committee on State Legislation
Dinner Meeting of Committee on International Law

March 5 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

March 11 *Stated Meeting of Association*
Meeting of Committee on State Legislation

March 12 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Marks and Unfair Competition
Dinner Meeting of Committee on the Domestic Relations Court
Dinner Meeting of Committee on Federal Legislation

March 13 Meeting of Section on Taxation
Dinner Meeting of Committee on Foreign Law
Dinner Meeting of Committee on the Bill of Rights
Dinner Meeting of Committee on Aeronautics

March 17 Meeting of Library Committee

March 18 Meeting of Committee on State Legislation
Meeting of Insurance Law Committee

March 19 Meeting of Committee on Admissions
Dinner Meeting of Committee on Courts of Superior Jurisdiction

March 20 *Opening of Photographic Show, 4:30 P.M.*

March 24 Dinner Meeting of Committee on Medical Jurisprudence

March 25 Meeting of Committee on State Legislation

The President's Letter

To the Members of the Association:

Over the past several years Presidents of the Association have reported on a number of important studies of current problems which have been made possible by generous grants from foundations. The Association welcomes the opportunity to make these studies and appreciates the confidence foundations have shown in the Association's objectivity and scholarship.

Each of these studies has been supervised by a committee of Association members who have special competence, assisted by research staffs composed of distinguished authorities. Examples of completed studies, which have seen the light of day are Children and Families in the Courts of New York City, the Federal Loyalty-Security Program and the Medical Expert Testimony Project.

There are presently four studies not yet completed. A study of the defense of indigent criminals is being made in cooperation with the National Legal Aid Association. Mr. Robert B. von Mehren is Chairman of the committee and Mr. Kenneth R. Frankl is Director of Research.

A study of Anti-Trust Laws and Foreign Trade has resulted in a preliminary report published by the committee in the spring of 1957. The staff director is Professor Kingman Brewster, Jr. of Harvard Law School. The Chairman of the committee is Mr. Breck P. McAllister. The final report will be published in the near future.

Only last month the Association received a grant to enable it to undertake a thorough-going examination of the effect of the conflict of interest statutes on recruiting public leadership, and we are presently engaged in assembling a committee and staff for this important project.

Preliminary investigation by the Association and the Columbia University Law School indicates that there may be new approaches to the old problem of congestion and delay in the courts. The Association will cooperate with the Law School in a thorough exploration of these new ideas.

It has been possible to secure the funds to support these studies and to publish the results not only because of the Association's reputation but because of the excellent facilities available to the staffs for research. The great collections of our Library demonstrate their value in connection with such work not only to the solution of the practical problems of practice but to legal scholarship in its broadest sense.

LOUIS M. LOEB

January 15, 1958

The International Atomic Energy Agency Challenge and Opportunity*

By ROBERT B. VON MEHREN†

It is a distinct pleasure for me to address this gathering. Many times I have had the opportunity of attending discussions arranged by the Atomic Industrial Forum. I am happy now to be able to make a direct contribution to one of those discussions.

It is only a few days since my return from Vienna where, as Legal Counsel of the Preparatory Commission of the International Atomic Energy Agency, I attended the First General Conference of the Agency and the first meetings of its Board of Governors. Hence, my remarks must necessarily reflect the immediacy of a recent experience rather than any more philosophical judgment that I might form if I were further removed in time from my topic.

I have called my remarks today "The International Atomic Energy Agency—Challenge and Opportunity," but before plunging into the heart of the matter—perhaps in view of my topic I should say the nucleus of the matter—let me describe, in a general way, the genesis and present condition of the International Atomic Energy Agency.

I. *HISTORY OF THE AGENCY*

Shortly after the end of World War II, thoughtful persons in many countries began to consider how the terrible forces that had been released over Hiroshima might be controlled. Considerable efforts were made to create a body for the international control of the warlike uses of atomic energy and a number of proposals concerning the control of nuclear armaments were made in the United Nations from 1946 to 1948. As we all know, these efforts were unsuccessful.

---

* This paper was presented on October 29, 1957 to the 4th Annual Conference of the Atomic Industrial Forum Inc. The opinions expressed herein are the personal views of the author and are not intended to reflect in any way an official position of the Preparatory Commission of the International Atomic Energy Agency or the International Atomic Energy Agency.

† Mr. von Mehren, a member of this Association and its Special Committee on Atomic Energy, was Legal Counsel to the Preparatory Commission of the International Atomic Energy Agency. He served the Preparatory Commission while it was working at United Nations Headquarters in New York during the first eight months of 1957 and attended the First General Conference of the International Atomic Energy Agency which was held in Vienna, Austria during October 1957. With the establishment of the International Atomic Energy Agency, the Preparatory Commission completed the task assigned to it by the Statute of the International Atomic Energy Agency and, pursuant to the Statute, its existence terminated.

On December 8, 1953, President Eisenhower, in a speech before the General Assembly of the United Nations, shifted the emphasis from control of the warlike uses of atomic energy to the promotion of its peaceful uses. In this speech, he suggested the creation of an international agency to be concerned with the peaceful uses of atomic energy.

The new agency, it was envisaged, would provide its members with information and technical assistance to develop their nuclear technology and, in particular, with nuclear materials to be contributed jointly by "the Governments principally involved . . . from their stock piles of normal uranium and fissionable materials."[1]

President Eisenhower's proposal was greeted with enthusiasm by the General Assembly and, in 1954, it was formally endorsed by an unanimous decision of the Assembly expressing the belief "that the benefits arising from the momentous discovery of atomic energy should be placed at the service of mankind," that "the use of atomic energy to the end that it will serve only the peaceful pursuits of mankind and ameliorate their living conditions" should be energetically promoted, and that "international co-operation in developing and expanding the peaceful uses of atomic energy to assist in lifting the burdens of hunger, poverty and disease" was important and urgent.[2]

In early 1955, a group of eight nations, advanced in nuclear technology and in the production of atomic raw materials, jointly undertook the task of preparing the initial draft of the Statute of the International Atomic Energy Agency. The countries composing this working party of eight were: —Australia, Belgium, Canada, France, Portugal, Union of South Africa, United Kingdom and the United States of America. By August, they had completed a first draft of a statute which was then circulated to all members of the United Nations or its specialized agencies.

Although this working party of eight conducted its discussions outside the United Nations, the General Assembly continued to maintain an active interest and took several steps to encourage the establishment of the new agency and to insure that it would have broad international support. One of the consequences of the General Assembly's interest was the expansion of the working group of eight to include four more countries:—Brazil, Czechoslovakia, India and the Union of Soviet Socialist Republics. In early 1956, this larger working party of twelve met privately in Washington to reexamine the original draft of the Statute. They negotiated a new draft of the Statute which was substantially revised to take account of the wishes expressed by those countries which had not participated in the earlier negotiations. This new draft was submitted to an international conference which convened in New York on September 20, 1956. This conference was composed of the largest number of countries that have ever participated in an international assembly. The conference met from September 20 to October

[1] United Nations, *Official Records of the General Assembly*, 8th Session, 470th Plenary Meeting.

[2] U.N. Document No. 810(IX).

26 and examined in detail the draft submitted by the twelve-nations working party. On October 26, the revised Statute was unanimously approved and during the following three months it was signed by the representatives of eighty-one nations.

The Statute of the International Atomic Energy Agency entered into force on July 29, 1957, and by the conclusion of the First General Conference on October 23, 1957, there were fifty-nine members of the Agency.

II. *OBJECTIVES AND STRUCTURE OF THE AGENCY*

The Statute of the International Atomic Energy Agency defines the basic objectives of the Agency in Article II:

> "The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose."

A full discussion of the short-term program of the Agency is contained in the "Report of the Preparatory Commission of the International Atomic Energy Agency."[3] This Report, which has been approved by the General Conference and the Board of Governors, outlines a modest program for the first years of the Agency, including assistance to national research programs, the dissemination of information and participation in international research programs such as the study of waste disposal and the measurement of radioactive background.

The organization which will work towards these objectives is composed of three bodies:—the General Conference, the Board of Governors and the Secretariat. All States which are Members of the Agency are members of the General Conference. Not more than twenty-five Members of the Agency are selected, in accordance with a complicated formula designed to ensure the maintenance of a balance among the conflicting political forces of the world and a proper geographical distribution among the principal regions of the world, to the Board of Governors. The first Board of Governors is composed of the following twenty-three Members:

Argentina	India	Romania
Australia	Indonesia	Sweden
Brazil	Italy	Turkey
Canada	Japan	Union of South Africa
Czechoslovakia	Korea	U.S.S.R.
Egypt	Pakistan	United Kingdom
France	Peru	U.S.A.
Guatemala	Portugal	

[3] IAEA Document No. GC.1/1, Gov. 1. Copies of this document may be purchased through the Agency or the United Nations.

The Secretariat furnishes the administration and staffing of the Agency. It is headed by the Director General who, in performing his duties, is "under the authority of and subject to the control of the Board of Governors."[4]

This structure may be more readily understood if I translate it into terms of a corporate enterprise. The General Conference, which meets annually, is the annual meeting of stockholders; the Board of Governors is the board of directors; and the Director General is the president of the corporation. Of course, this analogy is not strictly true, because, when considering an international agency, it must always be remembered that the members are sovereign states. This creates difficulties which may obscure what would otherwise be clearly recognized duties and obligations.

Thus, for example, the relationship between those Member States which have seats on the Board of Governors and the other Members of the Agency is not clear. This matter is not dealt with explicitly by the Statute, and there is no body of law to which the Board can turn for an authoritative determination.

At least three positions are possible:

(1) That each Governor represents all of the Member States;

(2) That each Governor represents only the States of the region from which he was selected; or

(3) That each Governor represents only his own State.

This problem was raised before the General Conference during its third meeting by the delegate from Israel who stated that:

> "... his delegation was ... concerned about the nature of the representation. It was reasonable to assume that each country in one of the areas enumerated would expect to have its interests and needs represented on the Board of Governors by the country elected as the Member for that area."[5]

This question has not yet been resolved. With respect to areas in which there is political controversy, such as the Middle East, it might prove to be a matter of some importance.

Before leaving the question of the structure of the Agency, I should like to make a few remarks concerning the relationship of the General Conference to the Board of Governors. Under the Statute of the Agency, certain specific functions are vested in the Board of Governors and other specific functions are vested in the General Conference.

The Board of Governors must initiate budget estimates and submit them to the General Conference for its approval. If the Conference does not

---

[4] Statute of the International Atomic Energy Agency, Article VII.B. (hereinafter cited as "Statute").

[5] Summary Record of Third Meeting of the First Regular Session of the General Conference, p. 14, IAEA Document No. GC.1/OR.4.

approve, it must return the budget to the Board with its recommendations. The Board is then under the obligation to submit further estimates to the General Conference for its approval.[6] This procedure must continue until the estimates of the Board are approved by the Conference.

A similar situation exists with respect to applications for membership in the Agency. A State can become a Member only after its "membership has been approved by the General Conference upon the recommendation of the Board of Governors."[7] Presumably, the proper construction of the Statute requires that a State seeking membership in the Agency must secure the approval of both the Board and the Conference.

The General Conference, in addition to a number of specific powers, has two general powers which may ultimately prove of great importance. It may

> ". . . discuss any questions or any matters within the scope of . . . [the] Statute or relating to the powers and functions of any organ provided for in . . . [the] Statute, and may make recommendations to the membership of the Agency or to the Board of Governors or to both on any such questions or matters."[8]

Moreover, the Conference can "propose matters for consideration by the Board and request from the Board reports on any matter relating to functions of the Agency."[9]

It is generally understood to have been the intent of the drafters of the Statute, and the Statute itself confirms, that the Board of Governors was to be a more important policy-making body than the General Conference. To return to my corporate analogy, it was in a real sense to be a board of directors. The Board, in its actions during my stay in Vienna, seemed to be accepting this position. It has decided that, in the absence of a decision by it to the contrary, its meetings shall be held in private[10] and the summary records of its meetings and the documents presented to or prepared by it have been given a limited circulation.

How long the Board can maintain the private nature of its meetings and the restricted character of its documentation is not clear. During the General Conference there was a challenge by the smaller Western European countries to the Board's original position that not even Members of the Agency not members of the Board should have the right to send observers to its meetings. At a meeting of the Administrative and Legal Committee, Dr. Tammes of the Netherlands stated that:

> ". . . the responsibilities of the two main organs of the Agency, the General Conference and the Board of Governors, were laid down in

---

6 Statute, Article XIV.A.

7 Statute, Article IV.B.

8 Statute, Article V.D.

9 Statute, Article V.F. 2.

10 Provisional Rules of Procedure of the Board of Governors, Rule 21, IAEA Document No. GC.1(S)/INF/7.

the Statute. Their mutual relations would, however, have to be developed mainly through practice. Hitherto the practice of the Board of Governors had been to hold closed sessions and to distribute its documents only to its members.

"The Agency intended to arouse among all its Members the greatest possible interest in its activities and thus to enlist their fullest cooperation. This aim could best be achieved if the Board adopted the practice of allowing Member States not members of the Board to send observers to its meetings and to receive its documents. . . ." [11]

The Board reacted quickly to the suggestion that Members of the Agency which were not members of the Board should be permitted to send observers to its meetings and, the day after the conclusion of this year's sessions of the General Conference, the Board passed a resolution to the effect that such observers could attend its meetings, unless it decided otherwise. The right of such observers to attend meetings does not, however, include the right to participate in debate. The Board also decided to distribute its agenda, the final summary records of its meetings and a monthly report of its decisions to all Members of the Agency.

III. *CHALLENGE AND OPPORTUNITY*

In the preceding portions of this paper, I have attempted to lay the ground work for the presentation of what I consider the most important part of this discussion. I turn now to the "Challenge and Opportunity" which exist for the Agency.

It is, I believe, appropriate to consider the challenge to the Agency and its opportunity as a more or less indivisible unit. The challenges are great because the opportunities are large; the opportunities are intriguing because the challenges pose such difficult issues.

The challenges to the Agency divide, in my opinion, into three principal categories:

(1) The challenge from within;

(2) The challenge from competing programs; and

(3) The world challenge.

A. *THE CHALLENGE FROM WITHIN*

In some of my previous remarks, I have hinted at the challenge from within. It is a challenge which relates directly and immediately to the proper functioning of the Agency. As I have said, the Agency has three principal organs:—the General Conference, the Board of Governors and the Secretariat. There is clearly developing a struggle for power between the General

[11] Summary Record of Seventh Meeting of the Administrative and Legal Committee, pp. 7–8, IAEA Document No. GC.1(S)/COM.2/OR.7.

Conference and the Board of Governors and a similar struggle may be foreseen between the Board of Governors and the Director General.

I have already hinted at the struggle for power between the Conference and the Board. It found its most concrete expression during the First General Conference in the statement made by Dr. Tammes of the Netherlands in the Administrative and Legal Committee. In more subtle ways, it was a profound influence throughout the First General Conference.

The proper resolution of this struggle is, in my judgment, a matter of greatest importance for the future of the Agency. If the technical, financial and policy matters with which the Board must deal are to be debated in public, that is to say, if its meetings are converted from private to public meetings or if there is a gradual transference of power from the Board to the Conference and the concomitant increase of political sensitivity, the effectiveness of the Agency will be severely diminished. A real test will be whether the Board is able to resist further pressure to convert its meetings from private meetings attended only by Governors, observers representing Members of the Agency and the Secretariat to meetings which can be attended by the public. International experience has shown that when privacy of debate leaves, international politics creeps in.

The struggle between the Director General and the Board has really not yet begun. But the storm clouds are gathering and when Sterling Cole takes up his post as Director General on December 1 of this year, he may soon face stormy weather.

The Statute provides that the Director General is the "chief administrative officer of the Agency."[12] It also provides that he "shall be under the authority of and subject to the control of the Board."[13] Common sense would seem to require that the actual administration of the Agency should be left to him and that he and the Board should co-operate in forming policy. Yet even in such an important administrative matter as selecting staff, it is doubtful that the Director General will have the necessary freedom. In every international organization there is a principle of geographical distribution in the selection of staff.[14] This results in considerable pressure by

> "The paramount consideration on the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible."

Member States upon the administrative head of the organization to select their candidates. That pressure will not be absent from the Agency. In the matter of recruitment and in other important administrative matters, the Board may be expected to attempt to exert a preponderant influence.

---

12 Statute, Article VII.A.

13 Statute, Article VII.B.

14 The Statute of the IAEA actually places geographical distribution last among the criteria for selecting staff. Article VII.D reads as follows:

This problem is rendered more acute by the fact that the first Director General will be an American. The U.S.S.R. has made it plain that its position is:

> ". . . that the post of Director General should be filled by a national of a neutral country. If such a position were held by a national of a great Power, countries in need of assistance might well feel legitimate concern about the Agency's activities and fear that their interests might be sacrificed to those of the great Power of which the Director General was a national. . . ." [15]

The West owes the U.S.S.R. a debt of gratitude for its statesmanlike withdrawal of its opposition to Mr. Cole's candidacy. If Russia had persisted, the omens for the success of the Agency would indeed be dark for, at its outset, the Agency would have faced the sort of paralysis that the United Nations experienced when Trygve Lie lost the confidence of the Eastern Bloc. But the deeply-felt conviction of the U.S.S.R., a conviction which is shared by many Members of the Agency, that the Director General should come from a neutral nation rather than from a great power, is bound to affect the relationship of the Director General with the Board of Governors and may make it more difficult for the Director General to achieve what I believe to be the proper administrative independence.

The challenge from within can, with patience and forebearance, be overcome. If it is, the Agency will establish in practice the strong, well-balanced organizational structure envisaged by the Statute. Together with the World Bank, it will have a structure which should lend itself to practical achievement rather than endless debate.

B. *THE CHALLENGE FROM COMPETING PROGRAMS*

Mankind has a way of never putting all its eggs in one basket. Great problems generate competing solutions. At least two different types of programs now exist which will necessarily compete with the Agency in its efforts to develop the peaceful uses of the atom. I do not intend to suggest that this competition will necessarily be harmful or, indeed, that in the long run it may not be converted into a productive co-operation. It is, however, a real difficulty which the Agency must face in its infancy.

As we all know, in addition to the international approach to peaceful uses of the atom there also exist bilateral and regional approaches. Our own country as well as several other important atomic powers—for example, Canada, the U.S.S.R. and the United Kingdom—have bilateral programs. In addition, there are several important regional groupings, the most significant of which is EURATOM.

Those countries which have bilateral programs must in the not too dis-

---

[15] Statement by Professor V. S. Emelyanov, Summary Record of the Sixth Meeting of the First General Conference, pp. 2–3, IAEA Document No. GC.1(S)/OR.6.

tant future consider and decide what is to be the relation between their bilateral programs and the Agency. This is, obviously, a matter of importance and difficulty. The essence of a bilateral program is that the initiating country retains control over the program in a way that is impossible if the same ultimate objectives are pursued through an international agency. To offset this disadvantage to the initiating power is the fact that certain controls and safeguards are likely to be more readily accepted if they are imposed through an international rather than a bilateral program.

In addition to this general problem, the United States bilateral program poses for the Agency a specific problem of magnitude. The Act of Congress under which the United States will participate in the Agency,[16] amends Section 54 of the Atomic Energy Act of 1954 to provide that:

> ". . . Unless hereafter otherwise authorized by law the Commission shall be compensated for special nuclear material so distributed at not less than the Commission's published charges applicable to the domestic distribution of such material. . . ."

This amendment requires that the Atomic Energy Commission charge the Agency for special nuclear material at least as much as the published charge applicable to domestic distribution. This requirement may make it difficult and perhaps impossible for the Agency to accept President Eisenhower's offer of 5,000 kilograms of contained uranium-235.

The Agency's difficulty arises from the fact that, under its Statute, it is required to establish a scale of charges designed to produce revenues adequate for the Agency to pay the expenses, other than certain administrative expenses, incurred by it in connection with "the costs of materials, services, equipment, and facilities provided by it under agreements with one or more members."[17] Thus, it will probably have to charge those who secure special nuclear materials through it somewhat more than it pays for such materials in order to meet the requirements of its Statute. Consequently, it may be cheaper for countries to secure special nuclear materials directly from the United States through a bilateral agreement rather than through the medium of the Agency.

This situation is, of course, a serious one from the Agency's point of view. There are ways in which it might be overcome without a further amendment to Section 54 of the Atomic Energy Act of 1954. A simple solution would be for the Atomic Energy Commission to charge those countries which obtain special nuclear materials through bilateral arrangements the same price as the Agency charges its Members for similar materials. This approach is, in my opinion, justified by the fact that the United States will probably incur certain costs for the implementation of bilateral safeguard systems which will be borne, where the Agency supplies the materials, by the user State. However, unless some affirmative action is taken, it may well

---

[16] 71 Stat. 453.

[17] Statute, Article XIV.B.2.

be that President Eisenhower's generous offer of 5,000 kilograms of contained uranium-235 will never be accepted. It is hard to believe that Congress' intention in amending Section 54 was to achieve this result. I am sure that serious thought is being given by the responsible authorities of our Government as to how this situation can be corrected.

The other type of program which challenges the Agency is the regional program. Indeed, the impact of this challenge has already been felt by the Agency. Several members of EURATOM delayed their ratification of the Statute of the Agency until they had ratified the EURATOM Treaty. Moreover, in the general debate during the First General Conference, Professor Goldschmidt of France made the following statement:

> "So far as nuclear materials were concerned, France was rich in uranium and thorium, and the first nuclear electric power plants, which would go into operation in 1958, would represent an increasingly large proportion of the working capacity. As soon as possible after the entry into force of the EURATOM Treaty, France, in agreement with the other parties to it, would inform the Agency of the nature of the nuclear fuel contribution which the EURATOM countries would make to it." [18]

It is encouraging that the peaceful uses of the atom are of such concern that several types of programs have been instituted. The ultimate choice between the various programs, as well as the technique of reconciling any conflicts among them, is a matter of the greatest importance. On the one hand, the Agency will have to prove that the international approach is the best. If it can do so, it may well be able to draw great strength from the work done through bilateral and regional programs. On the other hand, those charged with forming national atomic policy should not reject the international approach simply because the bilateral or regional approach may be more convenient or more familiar. At the very least, much serious thought should be given—both on a national and an international level—to the proper relationship between the Agency and bilateral and regional programs.

C. *THE WORLD CHALLENGE*

The final challenge to the Agency is not only the most serious but in turn offers the greatest opportunities. It is the part that the Agency can play in establishing a better relation between East and West and in solving the problem of control of the military uses of the atom.

The Agency will, in the first place, afford an opportunity for the scientific and technical personnel of the East and the West to meet and work together. The U.S.S.R. has made clear its intention to play a large role in the work of the Agency. This may make it possible to continue in a more permanent way

[18] Summary Record of the Tenth Meeting of the First General Conference, p. 3, IAEA Document No. GC.1(S)/OR.10.

the fruitful interchanges among scientists which were begun during the First Geneva Conference on the Peaceful Uses of Atomic Energy.

But the more important challenge and opportunity lies in this:—The necessity for control of the warlike uses of the atom and the potential contribution which the Agency might make to the solution of this problem. The Statute of the Agency provides for the establishment of a system of safeguards and inspection to assure that appropriate health and safety standards are observed and that no source or fissionable materials supplied by the Agency are diverted to non-peaceful uses. The Statute provides that the Agency's safeguards system may be applied, upon request, to projects which are not sponsored by the Agency. Several U.S. bilateral agreements and many, if not all, Canadian bilaterals contain provisions which would make it possible for the Agency's inspection system to be applied to them.

The Agency's inspection system has not yet been drawn up. It presents legal, technical and political problems of the greatest complexity. However, if these problems can be solved and a workable system established and proved in practice, a long step may have been taken towards the creation of an acceptable system for the control of the military uses of the atom. This in turn would be a significant stride towards effective disarmament.

The headquarters of the International Atomic Energy Agency will be in the ancient city of Vienna. Vienna is the capital of a country which, by its constitution, is declared to be a neutral. It lies at the edge of the Balkans. Only a few score of miles from Vienna is the Hungarian border marked by a double row of barbed wire, watch towers placed at close intervals and continuous military patrols. If the International Atomic Energy Agency can make some contribution, however small, to the removal of those barriers and the creation of a peaceful world, it will have justified all the effort and the good will that have gone into its creation.

The Implications of the Recent U. S. Supreme Court Decisions on Labor Arbitration

By WILLIAM J. ISAACSON

On the 3rd of June, 1957, at the last term of the Supreme Court of the United States, the Court handed down three decisions, the significance of which is far reaching and their implications profound. I refer to *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 and its companion cases, *General Elec. Co.* v. *Local 205, United Elec. Workers,* 353 U.S. 547, and *Goodall-Sanford, Inc.* v. *United Textile Workers, AFL,* 353 U.S. 550.

In deciding these cases the Court had to deal with, if not articulately answer, two of the most fundamental problems confronting the labor-management community. *First,* the Court had to deal with the thorniest of labor relations problems, the role of the judiciary. Specifically, the Court had to determine whether arbitration should be made legally enforceable on a national basis. Of necessity, since legal enforceability must carry with it some degree of judicial intervention, it had to determine whether any form of judicial intervention was desirable, and, particularly, as here, judicial intervention by injunction.

Secondly, the Court had to consider the respective roles of the federal and state governments in the enforcement of employer-labor organization contracts. While friction concerning the particular functions and role of the federal and state governments inheres in our federal scheme, it first became a major problem in labor-management relations with the expansion of federal power under the commerce clause and the exercise of that power on passage of the National Labor Relations Act. With the passage of the far-reaching Taft-Hartley Act in 1947, the opportunities of collision between state and federal spheres multiplied.

Editor's Note: Mr. Isaacson, General Counsel, Amalgamated Clothing Workers of America, delivered this lecture before the Section on Labor Law, I. Robert Feinberg, Chairman.

With these issues—judicial intervention and federal preemption—as our general frame of reference, I would analyze these opinions of the Supreme Court.

In each of the three Supreme Court cases under discussion an employer who had signed a collective bargaining agreement providing for arbitration of disputes with a union of his employees in an industry affecting commerce had declined to submit a dispute to arbitration. The union in each case sought in a federal district court specific performance of the contract to arbitrate. Federal jurisdiction was invoked under Section 301 (a) of the Labor-Management Relations Act, 1947[1] (Taft-Hartley Act) which provides that:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Court decreed enforcement in all three cases and labor arbitration in America entered upon a new era—a federal era.

Arbitration provisions in collective bargaining agreements affecting interstate commerce were now enforceable in the federal courts under federal law, irrespective of the law of the state in which the controversy arose. Enforcement could now be had under Section 301 of the Taft-Hartley Act, and federal law was to be fashioned on a case by case basis for that purpose. As aptly, albeit critically, summarized in the dissenting opinion of Justice Frankfurter in *Lincoln Mills,* Section 301 was "transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining."[2] The question no longer was whether there was to be a federal law providing for the enforcement of agreements to arbitrate under labor contracts,

---

[1] 61 Stat. 156 (1947), 29 U.S.C. 185 (1952).
[2] 353 U.S. at 461.

but what was that federal law to be. So, too, the question no longer was whether the federal government had taken hold of this area of labor-management relations, contract enforcement, but had it taken exclusive hold. Finally, the question no longer was could suits be brought in a federal court for the enforcement of an agreement to arbitrate, but could such a suit be brought in a state court as well.

To arrive at the result that labor agreements were enforceable, the majority in *Lincoln Mills* was compelled to pass through or around many legislative, judicial and constitutional obstacles. In a recently published critique of *Lincoln Mills* in particular and recent Supreme Court opinions generally[3] the Court's process was described in these terms:

> "In *Lincoln Mills* . . . difficulties of statutory construction overlying issues of federalism and of the proper function of the federal courts were disposed of in assertive fashion with little apparent consideration of their implications. The disposition was virtually without 'opinion' if by opinion we mean rationally articulated grounds of decision."

A. *ANALYSIS OF LINCOLN MILLS*

But rationally articulated grounds of decision or no, *Lincoln Mills* overcame many obstacles and decided several questions. Prior to 1925, the doctrine that executory agreements to arbitrate any kind of dispute would not be enforced was the rule in the federal courts. The question of enforcement of a labor arbitration agreement was rendered even more difficult in 1925 by the passage of the United States Arbitration Act.[4] The Arbitration Act, although making executory agreements to arbitrate specifically enforceable in the federal courts, excluded from its scope "contracts of employment . . . of workers engaged in interstate commerce."[5]

---

[3] Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. I, 6 (1957).

[4] 9 U.S.C. Secs. 1–14 (1952).

[5] 9 U.S.C. Sec. 1 (1952).

Plainly, with this kind of judicial and legislative background it was no easy task for the Supreme Court to ascribe to Section 301 a legislative intention to overturn the common law rule and to provide a substantive rule for the enforcement of collective agreements to arbitrate. The language of Section 301 was no aid. Section 301 (a) is phrased simply in jurisdictional terms.

Nor is there anything in the legislative history of Section 301 which indicates that Congress at any time focused on the problem of agreements to arbitrate. The most apt description of the legislative history is, as Justice Douglas observed, "somewhat cloudy and confusing."[6]

He found, however, a "few shafts of light that illuminate our problem."[7] It was through these "shafts of light" that the majority was enabled to see its way clear to leap over the "common law rule" against arbitration and presumably the United States Arbitration Act as well.

Justice Douglas climaxed his opinion by concluding that since it was the intention of the Congress to achieve industrial peace through the inclusion and enforceability of union "no strike" provisions and that since Congress intended to render "collective bargaining contracts equally binding and enforceable on both parties" the corresponding and reciprocal obligation to the "no strike" provision, the *quid pro quo,* the agreement to arbitrate, must now also become enforceable and an effective remedy provided.[8] Thus, the legislative premise of "equal responsibility under contract" was by judicial construction extended to include equal rights of enforcement of agreements to arbitrate future controversies to both management and labor.

In thus ascribing to Congress an intent, "by implication," to overturn the common law rule,[9] Section 301 became something more than jurisdictional, it became a directive to the federal judiciary to fashion a federal law for the enforcement of agree-

---

[6] 353 U.S. at 452.
[7] *Ibid.*
[8] 353 U.S. at 453–455.
[9] 353 U.S. at 456.

ments to arbitrate grievance disputes under collective bargaining agreements. In ascribing substantive content to Section 301 the majority, as Justice Frankfurter commented, made "Section 301 (a) a mountain instead of a molehill and it [thereby] solved all the constitutional problems that would otherwise have [had] to be faced."[10] He was referring to the constitutional question with which he had twice wrestled, the first time, in *Westinghouse Corp.*, 348 U.S. 437, 449–452, to no decision, and the second time in *Lincoln Mills*[11] to a fall. The constitutional question avoided by the majority was the validity of a grant of jurisdiction to federal courts over contracts that, according to Justice Frankfurter, came into being entirely by virtue of state substantive law. Therefore, he reasoned, since Article III, Section 2, extends federal judicial power only to cases arising under the laws of the United States, the statute was unconstitutional.

Aside from Section 301 and its inherent difficulties, still other legislative barriers stood in the path of enforcement of labor arbitration clauses. Section 4 of the Norris-LaGuardia Act[12] provides that no court of the United States shall have jurisdiction to enjoin a strike "in any case involving or growing out of a labor dispute." All other cases growing out of a labor dispute—that is, all cases in which strikes are not involved—are governed, if at all, by Section 7 of the Act. Section 7 provides the procedural requirements necessary to a grant of relief. Several courts had theretofore denied equitable relief to all petitioners under all circumstances on the basis of the Norris-LaGuardia Act.

But in *Lincoln Mills*, the majority concluded, "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed."[13] Here Justice Douglas was on most solid ground. As he observed, Section 8 of the Norris-LaGuardia Act "does indicate a Congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any per-

---

[10] 353 U.S. at 465.
[11] 353 U.S. at 469–484.
[12] 47 Stat. 70 (1932), 29 U.S.C. Secs. 101–15 (1952).
[13] 353 U.S. at 458.

son who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or voluntary arbitration."[14] He thereupon concluded that there was "no justification in policy for restricting Section 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."[15] Note, however, that he limits the inapplicability of the Norris-LaGuardia Act to suits involving "specific performance of a contract to arbitrary grievance." Nevertheless, as we shall see, it would have been helpful had Justice Douglas been less elliptical and sparing.

Aside from passing references to the United States Arbitration Act, the majority made no mention of that Act. In view of this silent treatment given the Act by the majority, the dissent assumes that the majority had, by implication, concluded that the Act was unavailable for the enforcement of arbitration clauses in collective bargaining agreements.[16]

As to *Association of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, the first case concerning Section 301 to reach the Supreme Court, Justice Douglas characterized it as "quite a different case" and disposed of it in a footnote.[17] In that case, the union sued to recover unpaid wages on behalf of some 4000 employees. Justice Douglas concluded "the basic question concerned the standing of the union to sue and recover on those individual employee contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer."[18] The contract in Westinghouse, although involving a grievance procedure, did not contain an arbitration clause as its terminal point.

The defects inherent in Section 301 and in its legislative genesis were thus overcome or bypassed, the yawning abyss of unconstitutionality first exposed by Justice Frankfurter in the Westing-

14 *Ibid.*
15 *Ibid.*
16 353 U.S. at 466.
17 453 U.S. at 456, note 6.
18 *Ibid.*

house case avoided, and finally, the limitations and restraints of Norris-LaGuardia rendered inapplicable.

Justices Burton and Harlan, although concurring in the result, did not subscribe to the conclusion that the substantive law to be applied in a suit under Section 301 was federal law and concluded that the constitutionality of Section 301 could "be upheld as a constitutional grant to Federal District Courts of . . . 'protective jurisdiction'"[19]

Justice Frankfurter took issue with the majority opinion on each of the issues in a dissent which is both brilliant and thorough. On what I believe Justice Frankfurter considered to be the single most important question before the Court, the role of the judiciary in labor arbitration, he was most incisive. In this connection, both the court majority and the victorious union felt the sting of his criticisms. In commenting upon what he regarded as the union's shortsightedness, he said (353 U.S. at 462–463):

> "It should also be noted that whatever may be a union's *ad hoc* benefit in a particular case, the meaning of collective bargaining for labor does not remotely derive from reliance on the sanction of litigation in the courts. Restrictions made by legislation like the Clayton Act of 1914, 38 Stat. 738 § § 20, 22 and the Norris-LaGuardia Act of 1932, 47 Stat. 70, upon the use of familiar remedies theretofore available in the federal courts, reflected deep fears of the labor movement of the use of such remedies against labor. But a union like any other combatant engaged in a particular fight, is ready to make an ally of an old enemy, and so we also find unions resorting to the otherwise much excoriated labor injunction. Such intermittent yielding to expediency does not change the fact that judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes; nor are the conditions for its effective functioning thereby altered."

[19] 353 U.S. at 460.

He concluded (353 U.S. at 464):

> "Cases under § 301 will probably present unusual rather than representative situations. A 'rule' derived from them is more likely to discombobulate than to compose. A 'uniform corpus' cannot be expected to evolve, certainly not within a time to serve its assumed function."

B. *ISSUES RAISED BY HOLDING IN LINCOLN MILLS*

In place of the questions which the majority in *Lincoln Mills* answered with finality, if not with grace, the majority opinion has spawned a new set of questions. *First,* to what aspects of contract enforcement is Section 301 applicable? *Second,* as Justice Douglas asked (and answered in part), what is the substantive law to be applied in suits under Section 301 (a)? *Third,* does the federal substantive law created by the judiciary under the directives of Section 301 constitute a body of law supplanting state law *or* may the state courts continue to enforce state law with reference to collective bargaining agreements affecting interstate commerce. *Fourth,* if federal law is deemed to be exclusive with reference to the question of enforcement of arbitration provisions under collective bargaining contracts, may this exclusive federal right be enforced in the state courts or solely and exclusively in the federal courts, and, if, enforceable in the state courts, are such cases subject to removal, and *Fifth,* to what extent does the Norris-LaGuardia Act remain as a barrier to injunctive restraint where such restraint is sought under the terms of Section 301.

1. *To What Aspects of Contract Enforcement is Section 301 Applicable?*

The first question raised by the decision is whether the majority intends that federal law shall apply to all questions which may arise concerning the validity of the agreement—its scope, function, interpretation and meaning of its terms, and applicable remedies? Phrased another way, do the barriers erected in *Westinghouse, supra,* against union action for asserted violations of individual rights created under collective agreements still stand.

If I may speculate, I would suggest that the Supreme Court, if again faced with the question as to whether a union has a right to sue on individual employee rights, as distinguished from collective union rights, arising under a collective bargaining agreement affecting commerce, would conclude that the union may sue for any violation of the collective bargaining agreement—whether the rights involved are individual employee rights or collective union rights. I believe that Justice Frankfurter indicated in his *Westinghouse* opinion that, in the absence of constitutional questions, he would have concluded that the union's right to sue under a collective bargaining agreement was without limit. Moreover, the Court now contains three judges who were not members of the Court at the time *Westinghouse* was decided.

In coming to the conclusion that *Westinghouse* is no longer a barrier to Section 301 suits, I am conscious of the individual character of the grievances which were involved in *Lincoln Mills, General Elec.* and *Goodall-Sanford, supra.*

In *Lincoln Mills* the question involved the work loads and work assignments of *10 individuals.* In the *General Electric* case, the questions to be arbitrated were whether a *single individual* was being paid at the right rate under the contract, and whether *another employee* had been wrongfully discharged. In the *Goodall-Sanford case,* as in *Westinghouse,* the grievance affected a vast number of employees. In *Goodall-Sanford,* the question was whether 1,136 employees laid off on one date, and 263 more on another, as a result of a plant's closing were nevertheless thereafter entitled to holiday pay and group insurance and pension rights.

In short, in all 3 cases, individual, as distinguished from collective rights, were involved.

2. *Assuming that the federal substantive law is to be all embracing, from what sources is that law to be drawn?*

Section 301 gives no hints as to the source of federal substantive law. Justice Douglas, however, suggests, "The Labor-Management Relations Act expressly furnishes some substantive law.

It points out what the parties may or may not do in certain situations."[20]

But, state law, too, "if compatible with the purpose of Section 301" may be resorted to as a source from which to draw upon in the formulation of the federal rule "that will best effectuate the federal policy."[21] But the majority makes it clear that *"any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."*[22] As noted above, Justice Douglas, in the words of the dissent, "glaringly ignores" any reference to what one would expect was the most likely source of federal law relating to arbitration, the United States Arbitration Act. The important and complicated questions relating to notice of arbitration, designation of arbitrator, stay, enforcement, modification and *vacatur,* are all specifically dealt with in that statute.

But this omission or rejection, reading silence as rejection, does not foreclose the federal courts from drawing upon the United States Arbitration Act for answers to the many problems which will arise in the formulation of a rule under Section 301. Despite the fundamental difference between commercial arbitration, to which the United States Arbitration Act unquestionably applies, and labor arbitration, there are many obvious points of similarity where experience as to the one is equally applicable to the other.

The inevitable conclusion from this entire discussion is that with reference to the enforcement of arbitration provisions as with reference to all questions arising under Section 301 the answers to the problems will come from many sources—the particular source of the law to be applied will depend on the nature of the question.

3. *Federal law, parallel or supplanting system?*

Is the federal law thus fashioned through "judicial inventiveness" to be a parallel system existing side by side with applicable

---

[20] 353 U.S. at 457.
[21] *Ibid.*
[22] *Ibid.*

state law or is the state law to be "absorbed as federal law" and no longer to exist as "an independent source of private rights?"[23] This, to my mind, is the most profound question arising from *Lincoln Mills* and its companion cases. The significance of the question to private litigants insures an early test.

Even though the majority opinion in *Linclon Mills* is silent on the question, one need not speculate as to whether the majority was aware of the federal-state problems inhering in its decision. The Supreme Court of the United States is now most sensitive to federal-state problems growing out of the enactment of recent federal labor legislation. In the past four terms, beginning with *Garner* v. *Teamsters Union,* 346 U.S. 485, the Court has decided no less than 16 cases involving the question of whether a particular controversy falls within the exclusive jurisdiction of the Federal Labor Board under the National Labor Relations Act.

As a matter of fact, Justice Frankfurter in both *Westinghouse,*[24] *supra,* and *Lincoln Mills*[25] expressly adverted to the federal-state questions which will arise from the application of a body of federal common law to questions of enforceability under Section 301.

No one can predict with certainty as to how the Supreme Court will rule when faced with the precise question of whether the federal law parallels or supplants state law. On November 25, 1957, however, in *Potoker* v. *Brooklyn Eagle, Inc.,*[26] an arbitration case, the Supreme Court denied certiorari, although one of the grounds on which certiorari was sought was that the federal law had superseded the New York State Arbitration Act under which the arbitration was instituted. I do not regard this as a definitive answer, however, but rather a postponement of the day of answer.

In suggesting an answer to the question, I would note that in the areas of labor-management relations in which the National

---

[23] 353 U.S. at 457.
[24] 348 U.S. at 454–455.
[25] 353 U.S. at 462, 464.
[26] 2 N.Y. (2d) 553, 141 N.E. (2d) 841.

Labor Relations Board either operates or may operate, the Supreme Court has reduced the area of the state courts and boards to an ever narrowing circle. The Supreme Court has increasingly emphasized the need for a uniform system of national law uniformly applied in the field of labor-management relations. If both state and federal systems of law are held to co-exist, there is a strong possibility that conflicting rules will apply with respect to the same contract and that the result that is reached will depend on the choice of forum. The inevitable result must be a scramble between the parties to initiate proceedings in that court whose substantive rules promise the more favorable result. The potentialities of collision between federal and state courts would be multiplied and the most delicate problems of federal-state relationships would be created. Infinite questions concerning the applicability of the statutory bar against federal enjoinder of state court actions would arise.[27]

On the other hand, if it is concluded that the federal law supplants the state law, and state law, aside from the extent to which it is absorbed into federal law, has no independent existence, a different set of problems arise. The impact of such a conclusion would be felt in inverse ratio to the maturity of state law in the area of collective bargaining agreements and labor arbitration. In the overwhelming majority of states, where there is no procedure for the enforcement of arbitration provisions of collective bargaining agreements, the problem is relatively simple. The near vacuum which now exists in such states will be replaced with federal substantive regulation. But, in the relatively few states like New York, where there is a highly developed and detailed statutory law of arbitration and decisions interpreting the statute, as well as a large body of decisions interpreting collective bargaining agreements, the effect of sweeping away the entire state jurisprudence on the subject and replacing it with an inchoate set of rights and procedures would raise real problems.

---

[27] 28 U.S.C. Sec. 2283 (1952).

4. *May state courts exercise concurrent jurisdiction into federal courts?*

If it is determined that all actions for enforcement of collective agreement must be determined on the basis of the federal law, there still remains the question of whether the state courts and the federal courts are to exercise concurrent jurisdiction.

The language of Section 301 would seem to indicate that both the federal and state courts were to be available for suits under its provisions.

But yet, if it is decided that the state courts have concurrent jurisdiction, a heavy burden, perhaps one that the state courts cannot shoulder, will, in the first instance, be placed upon them. For in many situations, the state courts will be called upon to ascertain, or divine federal law, without benefit of any previous expression on the part of the federal courts.

But if it should be held that suits under federal law may be brought in state courts, one of the questions which immediately arises is whether the removal statute,[28] will be applicable. If it were concluded that Section 301 left intact a separate and independent state cause of action where inter-state commerce was present, the plaintiff suing under a collective bargaining agreement may elect to rely on federal or state law. If he elects to rely on state law removal will not lie.

Where the plaintiff relies on the federal substantive law, or if federal law is exclusive, the case is clearly removable unless Section 301 is read as containing an implied exception to the removal statute.

A final problem with respect to removal is whether motions to compel arbitration, to appoint an arbitrator, to stay a suit pending arbitration, or to confirm or vacate an award, are "civil actions" within the meaning of the removal statute. It has been held that a motion to compel arbitration under the New York Arbitration Law or a motion for the appointment of an arbitra-

[28] 28 U.S.C. 144 (1952).

tor, do not constitute "civil actions" and hence are not removable.[29] In *Marchant* v. *Mead Morrison Mfg. Co.*,[30] however, there was dicta to the effect that a motion to confirm an award is a removable civil action.

5. *Applicability of Norris-LaGuardia Restraints?*

As our final question outstanding as a consequence of *Lincoln Mills*, we turn to the relationship between Section 301 and the Norris-LaGuardia Act. The question here is not whether the restraints upon the judiciary contained in Norris-LaGuardia apply undiminished. Obviously they do not. The precise question is, to what extent do the prohibition and restraints of Norris-LaGuardia apply to Section 301 suits for specific performance of no-strike clauses. The *Lincoln Mills* holding *vis-a-vis* Norris-LaGuardia was a limited one. The court held, "we see no justification in policy for restricting Section 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedure requirements of the Act."[31] The Court supports this statement with a footnote reference to *Local 205* v. *General Elec. Co.*, 233 F. 2d 85, 92.

It would have been well had the majority exposed this issue to the kind of probing analysis given it by Chief Judge Magruder of the First Circuit in the cited *General Electric* case. In that case Chief Judge Magruder expounded at length on the distinction between *W. L. Mead Inc.* v. *International Brotherhood of Teamsters*,[32] in which he had held that the Norris-LaGuardia Act applied to an application for an injunction against a strike in violation of an agreement, and *General Electric*, where he decided it was inapplicable to a suit for enforcement of an arbitration agreement.

Since the issuance of *Lincoln Mills*, however, both state and federal courts have concluded that an injunction may issue

---

29 *In re Red Cross Line*, 277 Fed. 853 (D. N.Y. 1921); *Marchant* v. *Mead-Morrison Mfg. Co.*, 7 F. 2d 511, (S.D. N.Y. 1925), affd. 11 F. 2d 368.

30 *Ibid.*

31 353 U.S. at 458.

32 217 F. 2d 6, 8–10 (1954).

against a strike for violation of a no-strike clause. The District Court for the Eastern District of New York in two recent cases involving a strike against Bull Steamship Co. so concluded.[33]

In the first of these cases the Court read into the *Lincoln Mills* Decision the complete elimination of Norris-LaGuardia insofar as the enforcement of collective bargaining agreements was concerned. It reasoned "the primary objective of the 1932 Norris-LaGuardia Act was to aid workers in their efforts to organize and enter into collective bargaining agreements, rather than the consideration of the rights and remedies of the parties thereunder, subsequent to the execution of such agreement . . . a principal purpose of the [Taft-Hartley Act] not contemplated by the Norris-LaGuardia Act was the enforcement of collective bargaining agreements." On November 21, the Second Circuit reversed and remanded both cases. Certiorari was thereupon filed.[34]

In my view, the reversal is sound and should stand up, particularly in view of the fact that the Taft-Hartley Act at numerous points expressly permits injunctive relief. This would seem to indicate that the statute intended no general repeal of the Norris-LaGuardia Act with respect to the enforcement of collective bargaining agreements.

In the most interesting and best written decision involving Section 301 since *Lincoln Mills,* the California Supreme Court in *McCarroll* v. *Council of Teamsters,*[35] upheld the power of a state court as distinguished from a federal court—to enjoin a strike by a grant of specific performance of a union no-strike clause. The court concluded that state courts have concurrent jurisdiction with federal courts over actions which may be brought in federal courts under Section 301. It went on to say, however, that State

---

[33] *Bull Steamship Co.* v. *Seafarers International Union,* 26 U.S.L. Week 2168 (Sept. 27, 1957); *Bull Steamship* v. *National Engineers and Masters, Mates & Pilots, Inc.,* 26 U.S.L. Week 2242 (Oct. 17, 1957).

[34] Reversed, 41 LRRM 2121 (Nov. 21, 1957). On December 5, 1957, Mr. Justice Harlan of the United States Supreme Court ordered the Court of Appeals to stay its order directing the District Court to terminate its injunction, pending consideration of the petition for certiorari. N. Y. Times, December 6, 1957, p. 58, col. 1.

[35] 304 P. (2d) 781 [40 LRRM 2709] (Cal. Sup. Ct., Sept. 13, 1957).

courts, in exercising this jurisdiction, are not free to apply state law, but must apply the federal law of collective bargaining contracts, for "otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought."[36] It went on to say that Section 301, however does not confide jurisdiction to one expert tribunal for the development of federal policy, but on the contrary gives jurisdiction to all the federal district courts. The possibility of conflict between State and federal courts is no greater than the possibility of conflict among the federal courts themselves, with uniformity ultimately dependent in either case on review by the United States Supreme Court.

As to the application of Norris-LaGuardia, the California Supreme Court expressly stated that it continued to be applicable with respect to the enforcement of collective bargaining agreements in the federal courts[37] but that state courts were not subject to the same restraints. The court concluded, "A state court enforcing a federal right is not simply another federal court." This last statement by the Court is intended as an answer to the philosophy of the Supreme Court expressed in *Bernhardt* v. *Polygraphic Co.*[38] In the *Bernhardt* case, the court stressed that the goal of diversity jurisdiction is substantial similarity of outcome irrespective of whether an action is brought in a state or federal court, and that remedies often go to the substance of the right. The *McCarroll* decision does not square with the thoughts expressed in *Bernhardt*.

6. *Summary*

The significance of *Lincoln Mills,* irrespective of the many questions the majority opinion left unanswered, is vast. The entire collective bargaining process, of which the grievance and arbitration procedure is an essential and integral part, has now been subjected to judicial sanction on a national basis.

Undoubtedly, this joinder of judicial sanction and the arbitra-

[36] 40 LRRM at 2715.
[37] *Ibid.*
[38] 350 U.S. 198, 202–204 (1956).

tion process will work some changes in the development of grievance arbitration, and backing up from there, grievance handling. The imprint of the courts will be seen here just as it has in the development of the pre-agreement collective bargaining process itself.

But while collective bargaining does in many ways reflect judicial opinion, its basic elements and procedures have been fashioned by the unions and employers themselves and, more significantly, are applied by particular employers and unions on an *ad hoc* basis. Judicial sanction and "judicial inventiveness" need not necessarily spell out curbs to freedom of action. If, however, judicial enforcement were to become judicial dictation and the flexible procedures of grievance arbitration judicially ossified, arbitration would cease to serve as a desirable alternative to economic sanction.

Justice Frankfurter, in his dissent in *Lincoln Mills,* vigorously urges "that judicial intervention is ill suited to the special characteristics of the arbitration process in labor disputes." It may well be. The answer might well be yes as to the question posed by the late Dean Harry Shulman, (quoted in the dissent in *Lincoln Mills*)[39] that when labor and management's "autonomous system [of arbitration] breaks down" "the parties better be left to the usual methods of adjustments of labor disputes rather than to court actions on the contract or on the arbitration award?"

But doesn't this kind of question overlook the basic fact that state courts daily deal with questions which interpret the meaning and scope of collective agreements. In the absence of the federal courts, the state courts become the forum for the disposition of all such questions.

Moreover, under the Taft-Hartley Act, is the alternative to court actions to enforce arbitration agreements the parties "usual methods for adjustment"? In the case of a labor union, the "usual method for adjustment" would be a strike. Justice Frankfurter's observations concerning the undesirability of judicial interven-

---

[39] 353 U.S. at 463.

tion would become more meaningful if he were prepared to hold with the majority in *Lincoln Mills* that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," and, he and the majority were then prepared to follow through with a conclusion that the "no strike" obligation is automatically cancelled out by the employer's refusal to arbitrate. Of course, even then, there would be many instances when a strike would be much too potent a counter-weapon to a refusal to arbitrate. The significance of a refusal to arbitrate, after all, depends in a large part on the significance of the grievance underlying the requested arbitration.

Justice Frankfurter's dissent, however, does become more meaningful if Section 301 is ultimately interpreted to provide that judicial enforcement of collective agreements results in a complete denial of the Norris-LaGuardia limitations. Employer representatives may regard decisions such as that of the Eastern District of New York in the *Bull* cases as presenting them with an ultimate weapon. In terms of immediate goals, if I may be less than precise, it is an ultimate weapon. But in the long run such decisions may well bring about the elimination of arbitration and the many positive values it represents. Unions faced with decisions sweeping aside Norris-LaGuardia protections will no longer enter into arbitration agreements and coterminous no-strike clauses. The strike and suits in damages will be substituted in their stead. This would indeed be a great disservice to the cause of sound and harmonious labor-management relations in which we serve, a disservice which I am certain none of us desire or intend. In terms of our long term objectives, we must seek to evolve a body of law which preserves and promotes voluntary arbitration. In so doing we shall tend to make recourse to economic sanction neither necessary or desirable to either unions or employers.

Recent Decisions of the United States Supreme Court

By WILLIAM B. MATTESON and LEONARD M. LEIMAN

LAMBERT V. CALIFORNIA

(December 16, 1957)

It is not uncommon for statutes to impose criminal penalties without requiring that the person charged with the statutory duty either know or be given notice that some action or inaction is required of him. Registration statutes, which may be concerned with anything from recording ownership of automobiles to maintaining a check on activities of aliens, are commonly of this type. In prosecutions for violations of these statutes, it is usually not necessary to prove that the failure to register was wilful, i.e., that the defendant, knowing of his duty to register, intentionally failed to comply. Despite the widespread use of such statutes and the multitude of decisions upholding their validity, the Supreme Court in *Lambert* v. *California* refused to sanction the application of a registration statute which it considered to be, in the words of Mr. Justice Holmes, "A law which punished conduct which would not be blameworthy in the average member of the community. . . ." On appeal from the Appellate Department of the Superior Court of California, the Supreme Court reversed a conviction based on the defendant's failure to register as a person convicted of a felony as required by the Los Angeles Municipal Code. The conviction violated the Due Process Clause of the Fourteenth Amendment because the defendant had no knowledge and there was no proof of the probability of her having knowledge of the registration requirement.

Appellant, Virginia Lambert, was arrested on suspicion of committing an undisclosed offense. She was later charged with violation of the provision of the Los Angeles Municipal Code which makes it unlawful for any "convicted person" to remain in the City of Los Angeles for a period of more than five days without registering with the Police Department. A "convicted person" is defined to include any person convicted of an offense punishable as a felony in California, regardless of where such offense was committed. Each day's failure to register is a separate offense under the Code.

Appellant had been a resident of Los Angeles for over seven years and within that period had been convicted of forgery, an offense considered to be a felony in California. Although appellant had been convicted in Los Angeles she had not registered as a "convicted person." At her trial she asserted that the registration statute denied her due process of law and violated "other" of her constitutional rights under the Federal Constitution. The trial court found no merit in her contentions and rejected her offer of

proof that she had no knowledge of the statutory requirement. Appellant was found guilty by the jury. She was fined $250 and placed on probation for three years.

On appeal to the Appellate Department of the Superior Court of California, appellant again attacked the constitutionality of the registration requirement of the Code. The conviction was affirmed. Appellant then appealed in *forma pauperis* and *pro se* to the United States Supreme Court under 28 U.S.C. §1257(2), which permits an appeal from a final state judgment where the validity of a statute of a State is drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision below is in favor of the validity of the statute. The Court noted probable jurisdiction, 352 U.S. 914, and designated *amicus curiae* to appear for appellant before the Court.

After argument and reargument the Court in a 5–4 decision reversed the conviction, Mr. Justice Douglas writing the opinion of the Court. Justices Harlan, Whittaker and Frankfurter dissented in an opinion written by Mr. Justice Frankfurter; Mr. Justice Burton noted his separate dissent.

The Court began by noting that no element of wilfulness was included in the statute nor found necessary by the California Court. Appellant had offered proof that she had no knowledge of the registration requirement; since this offer of proof was refused, the Court assumed that appellant had no actual knowledge of the requirement. Thus the Court framed the issue as whether a conviction for failure to register violated due process where the person convicted has no actual knowledge of the duty to register and no showing is made of the probability of such knowledge.

The Court admitted that lawmakers have a "wide latitude" to declare conduct criminal without requiring proof that the person charged with the crime had knowledge that his conduct was in fact illegal. However, the conduct here involved was wholly passive, being a mere failure to register. There were no circumstances to alert the person that there was a duty to register. Due process of law does place some limits on the rule that ignorance of the law is no excuse, to the extent that it requires notice under some circumstances: e.g., before property interests are disturbed, assessments made, penalties or forfeitures assessed. While these examples involve only property interests in civil litigation, this is unimportant as the principle is "equally appropriate" where a person, wholly passive and unaware of any wrongdoing, is charged with a crime.

The Court recognized that registration laws are common and cover a wide range of subjects. Many resemble licensing statutes directed at regulation of business activities. But the instant statute involves no activity: mere presence in the City of Los Angeles is the test. Moreover, as opposed to other registration statutes, circumstances which might lead a convicted person to inquire as to the necessity of registration are completely lacking. The instant statute is merely a law enforcement technique designed for the convenience of law enforcement agencies; the disclosures required are merely a compilation of convictions already recorded in the jurisdictions where the

crimes have been committed. Nevertheless appellant, after becoming aware of the registration statute, was given no opportunity to avoid its penalty by giving the information required. She could but suffer the "heavy criminal penalties" provided thereunder.

> "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."

Mr. Justice Frankfurter in his dissent pointed out that the many Federal and State laws which impose penalties regardless of awareness of wrongdoing, have been sustained by a long line of judicial decisions. It is no more unjust and unfair to imprison a person for five years for an unintentional violation of the narcotics law than it is to fine appellant $250 and place her on probation for three years for her failure to register. Hardship in some cases may be alleviated by interpreting a statute to include an element of conscious wrongdoing and in others, disproportionate punishment may be struck down as cruel and unusual punishment under the Eighth Amendment or as a violation of the Due Process Clause of the Fourteenth Amendment. But the Court here, in accomplishing this purpose, has drawn a constitutional line between "doing and not-doing," a return to Year Book distinctions between feasance and non-feasance. Mr. Justice Frankfurter considered that the theory of the Court's decision, if generally accepted, would impair or overthrow a vast range of legislation in the country. However, it was not necessary to protract his dissent because:

> "I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law. Accordingly, I content myself with dissenting."

Mr. Justice Burton dissented separately, stating that he did not find that the ordinance, as applied here, violated appellant's constitutional rights.

* * *

This case is indeed a departure from what was considered to be well settled principles of law. The Court has in effect said that before a person may be convicted of a crime involving merely inaction, he must know, or there must be a probability that he has knowledge, that the inaction is in fact a crime. The application of this holding to other criminal statutes would without question result in considerable upheaval of the criminal law in this country, for the Court has held, at least in the area of passive crimes, that ignorance of the law must be an excuse.

The Court may have been concerned by the unusual nature of this registration statute. If similar statutes were in general use, it might have been

less troubled by the case. Perhaps this is what the Court had in mind in suggesting that "proof of the probability of knowledge" of the statute would have led to an affirmance of the appellant's conviction, although the Court failed to explain or discuss what it meant to encompass by this phrase. In addition, the Court seems to suggest that the punishment was unduly harsh for the crime, as appellant was punished for failing to supply information already in Police Department files under a requirement designed merely for the convenience of law enforcement officials. However, this analysis ignores the real purpose of the statute: to keep a check on known criminals present in the city, an important purpose when the high incidence of multiple offenders is considered.

The due process cases requiring that notice be given to property owners, which the Court equated with the present case, are not really applicable. The notice requirement in such cases is that before property may be affected in any proceeding, notice must be given to the property owner. This requires, in the instant case, only that notice must be given to the appellant of the criminal proceeding instituted against her, a question not in issue. It does not mean that notice must be given appellant before she fails to register that a failure to register is a criminal act.

GREEN V. UNITED STATES

(December 16, 1957)

The considerations which make *stare decisis* an important element in the administration of the law may, perhaps, be somewhat less compelling where constitutional questions are involved, as there the "rightness" of the decision is of primary importance. Nevertheless, long-standing judicial interpretations of the Constitution, which have become part of the fabric of accepted constitutional doctrine, are rarely overturned, even where the need for predictable rules is not readily apparent. In *Green* v. *United States,* however, the Supreme Court appears to have overruled an interpretation of the double jeopardy provision of the Fifth Amendment which had stood for more than fifty years.

Green was indicted in the District of Columbia on two counts: (1) arson, and (2) having caused the death of a woman by the arson. Under the District code, an unintentional homicide committed in the course of arson is murder in the first degree, for which a death sentence is mandatory. The trial judge charged the jury that it could find Green guilty of arson on the first count, and, on the second, either of first degree murder or second degree murder, which is defined as the killing of another "with malice aforethought" and punishable by a maximum term of life imprisonment. The jury found Green guilty of arson and second degree murder, returning no verdict on the charge of first degree murder. Green was sentenced to one to three years for arson and five to twenty years for murder.

Green then appealed to the Court of Appeals for the District of Columbia, attacking only the murder conviction. He argued that the only choice

open to the jury was a finding of guilty or acquittal of murder in the first degree: the judge should not have charged second degree murder, since this charge was not supported by the evidence and allowed the jury to reach a compromise verdict. On oral argument, Green's counsel informed the court that Green, then 64 years old, was aware of the risk of a death penalty on a retrial, but that he preferred death to imprisonment for the remainder of his life. The Court of Appeals reversed and ordered a new trial, 218 F. 2d 856.

On retrial, Green for the first time claimed that the double jeopardy provision of the Fifth Amendment was a bar to a new trial on the charge of first degree murder. This claim was rejected; the jury convicted Green of first degree murder, and the Court of Appeals, sitting *en banc,* affirmed the conviction by a six to three vote, 236 F. 2d 708.

The Supreme Court granted certiorari and in an opinion delivered by Mr. Justice Black held that Green could not again be tried for first degree murder. Mr. Justice Frankfurter, joined by Justices Burton, Clark and Harlan, dissented.

The Court first reviewed the history of the provision of the Constitution which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This concept, recorded by Blackstone and "deeply ingrained" in Anglo-American jurisprudence, is that the State, with all its resources, should not harass an individual, and enhance the possibility that an innocent person might be convicted, by repeated attempts to convict the same person for an alleged offense. As developed in this country, a verdict of acquittal is final, even when not followed by any judgment, *United States* v. *Ball,* 163 U.S. 662. Moreover, the Supreme Court has taken the position that once a person is put to trial before a jury, jeopardy attaches; if the jury is discharged without his consent, he cannot be retried, *Wade* v. *Hunter,* 336 U.S. 684. However, where a conviction has been reversed on appeal, the Court has agreed with most other courts, which hold that the defendant can be tried again for the same offense, either because in securing the reversal he has "waived" the plea of former jeopardy, or because the second trial is a continuation of the first, so that only one jeopardy is involved.

Green had once been put in jeopardy for first degree murder at the first trial. The jury, having had an opportunity to convict him for that offense, was discharged without ever having returned a verdict on that charge. On the assumption that the jury's choice in finding Green guilty of second degree murder was, as a majority of cases in this country have held, an "implicit acquittal" on the first degree murder charge, or on the ground that the jury was dismissed after a full opportunity to return a verdict on that count and no extraordinary circumstances prevented it from doing so, Green's jeopardy for first degree murder ended when the jury was discharged. He cannot be retried for that offense.

Prior to his appeal, or had his appeal been unsuccessful, Green could not have been retried for first degree murder. The Court rejected the "para-

doxical contention" that the success of the appeal changes this result; any theory of waiver is wholly fictional, and gives the defendant "no meaningful choice." The argument that the retrial for first degree murder was a continuing jeopardy was also rejected, on the ground that the bar against a retrial on that charge was unaffected by an appeal from the different charge of second degree murder. In short, the law will not place a defendant in the "incredible dilemma" of bartering

> "his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment."

Finally, the Court considered *Trono* v. *United States,* 199 U.S. 521, which the Government claimed was a conclusive precedent against the former jeopardy plea. In *Trono,* the defendants had been charged with murder but were acquitted of that charge and found guilty of assault, a lesser offense. On appeal, the Philippine Supreme Court, acting under the Spanish practice permitting review of the law and the facts, found them guilty of murder and increased their sentences. The Supreme Court of the United States, dividing 5–4, affirmed the conviction. Four Justices of the majority adopted a waiver theory, and Mr. Justice Holmes, who in an earlier case had expressed the view that a new trial after an appeal was a continuing jeopardy, concurred in the result. Noting that in *Trono* neither the waiver view nor Holmes's continuing jeopardy theory had been accepted by a majority of the Court, and that either, if accepted, "would unduly impair the constitutional prohibition against double jeopardy," the Court distinguished *Trono* on the ground that that case arose not under the Fifth Amendment, but under a statutory provision governing the Philippine Islands, a newly-acquired territory with legal procedures alien to the common law. Language in the *Trono* opinion, that the statutory provision had the same effect as the Fifth Amendment, is to be dismissed as *dictum.*

Mr. Justice Frankfurter's dissent reviewed the history of the double jeopardy provision, from Blackstone through to its inclusion in the Fifth Amendment. He noted that the *Trono* case had been preceded, some fifty years earlier, by *United States* v. *Harding,* 26 Fed. Cas. 131, where Mr. Justice Grier assumed that a defendant, convicted of a lesser offense, could be found guilty on retrial of the greater offense charged in the indictment. In *Trono,* the first time the question reached the Supreme Court, the Court adopted Mr. Justice Grier's view and clearly decided the question as a matter of constitutional law. Moreover, the statutory provision involved in *Trono* was a product of American constitutional doctrine, as was expressly understood by the Court; later statements of the Court, treating *Trono* as directly relevant to the Fifth Amendment,

> "show that the principle of that case cannot in all good conscience be rested on the criminal procedure of the Philippine Islands, but on a construction of the Fifth Amendment itself, and as such binding on the entire federal judiciary."

Mr. Justice Frankfurter concluded, therefore, that *Trono* was overruled by the Court.

The Court's assumption that the jury's silence amounted to an "implicit acquittal" on the charge of first degree murder was questioned by Mr. Justice Frankfurter. The trial judge, by erroneously charging on second degree murder, had given the jury a chance to compromise, and the verdict was an irrational one: the findings of guilty of arson and second degree murder contain all the elements necessary for a conviction of first degree murder.

Mr. Justice Frankfurter objected to the Court's refusal to accept *stare decisis* as a binding principle on a constitutional question which, unlike the Due Process Clause, does not depend on changing concepts of minimum standards of fairness. The "contours" of the double jeopardy provision are "the product of history":

> "In this situation the passage of time is not enough, and the conviction borne to the mind of the rightness of an overturning decision must surely be of a highly compelling quality to justify overruling a well established precedent when we are presented with no considerations fairly deemed to have been wanting to those who preceded us. Whatever might have been the allowable result if the question of retrying a defendant for the greater offense were here for the first time, to fashion a policy *in favorem vitae*, it is foreclosed by the decision in *Trono* v. *United States*."

Finally, Mr. Justice Frankfurter objected to the Court's disregarding the interests of society by making an absolute of the interests of the accused. Many states permit what the Court prohibits in this case, and under the Due Process Clause, the Court has held that a State can appeal from a conviction of second degree murder and, on retrial, obtain a conviction of first degree murder, *Palko* v. *Connecticut*, 302 U.S. 319. The double jeopardy provision represents a balance between the interests of society and the accused, and was not intended to prevent a retrial in the instant case, where both parties are entitled to have a new trial free from prejudicial errors.

* * *

It is surprising that the error of the district judge in charging the lesser offense should have the disastrous consequences, from the Government's point of view, that it did: Green cannot now be convicted for either first or second degree murder, thereby escaping the consequences of action found criminal by two successive juries. The effect of this case will, of course, be to make district judges much more careful in charging the jury on lesser included offenses, as an error in charging a lesser offense may ultimately result in the defendant going unpunished.

On his first appeal, Green himself argued that the evidence at the trial proved, if anything, first degree murder. Retrying Green under these circumstances seems much less harsh than, for example, retrying a defendant for the same offense after a reversal of a conviction because the prosecution has failed to meet its burden of proof, or where there has been a hung jury.

By finding Green guilty of second degree murder, the first jury must have determined that Green committed acts sufficient to support a conviction of murder in the first degree. It may be, as Green successfully argued, that he had a right to have the jury consider only an offense punishable by death, which might have made the jury think twice about its verdict. But this very argument seems sufficient only to justify a retrial for first degree murder, not a complete and final acquittal.

Recent Decisions of the New York Court of Appeals

By SHELDON OLIENSIS and BARRY H. GARFINKEL

EISEN V. POST

(3 N.Y. 2d 518, December 6, 1957)

The Court of Appeals, splitting five to two and reversing a unanimous decision of the Appellate Division, First Department, has carved out an important exception to the statute requiring stockholder consent for a corporation's sale of all its assets. The decision may well eliminate the requirement entirely for certain corporations engaged in operating a single piece of real estate.

Plaintiff, a 50% stockholder in a corporation, sued to set aside the sale of the corporation's only asset—a lease of the Theatre de Lys in Greenwich Village. Although, under its charter, the corporation was authorized generally to buy and sell real estate, it had never acquired or sought to acquire any other property. The sale was pursuant to a plan under which the proceeds were to be distributed pro rata among the stockholders, thus in effect liquidating the corporation.

Plaintiff contended that sale of the lease without his consent violated Section 20 of the Stock Corporation Law which requires stockholder approval of a sale of corporate property where the sale "is not made in the regular course of business of the corporation and involves all or substantially all of its property."

Special Term directed judgment in favor of defendants. The Appellate Division, First Department, in a *per curiam* opinion, reversed.

Reversing the Appellate Division, the Court of Appeals, through Chief Judge Conway, ruled that Section 20 was inapplicable to the sale. Section 20, the Court held, is applicable only "if the sale is such as to render the corporation unable, in whole or in part, presently to accomplish the purposes or objects for which it was incorporated." Since, under the charter, the corporate purposes were to buy and sell real estate generally and the sale did not affect the corporation's ability to carry on this business, the sale was in the "regular course of business" of the corporation.

The Court rejected plaintiff's argument that, in determining the corporation's "regular course of business" under Section 20, the Court should look not only to the charter but to the business in which the corporation was "actually engaged"—which in this case, plaintiff contended, was the operation of a theater and the production of plays. The Court placed its rejection, however, on a narrow ground: if the corporation were actually engaged in the theatrical business, it was acting *ultra vires*, and *ultra vires* activity "can-

not be deemed the regular business of the corporation within the meaning of section 20."

The Court buttressed its conclusion with the argument that title searchers should not be required to go beyond the corporate charter in determining whether or not stockholder consent to a sale of real estate was required. This contention, however, seems inconsistent with basing the inapplicability of Section 20 solely on the *ultra vires* nature of the corporation's actual business. As the Court recognized, an act not *ultra vires* might still not be in the regular course of the business in which the corporation was actually engaged. Consequently, unless the actual business is to be ignored completely, title searchers would be required in certain instances to go beyond the charter.

Judge Fuld wrote the dissenting opinion, in which Judge Van Voorhis concurred. The issue before the Court, the dissenters stated, was whether Section 20 covered a corporation which, although authorized to deal in real estate generally, has actually operated only a single piece of property. The dissenters read the majority opinion as holding that any sale by such a corporation must be deemed in the "regular course of business." In effect, the majority decision holds the (the dissenters stated) that a corporation's regular course of business must be determined solely from the language of its charter and without consideration of the activity in which it is actually engaged. Section 20 would thus be rendered ineffective except as to sales which were beyond the corporation's powers—a result which would defeat the statutory purpose of protecting minority stockholders. The Court should not, the dissenters stated, "jettison the rights of minority stockholders in order to facilitate the work of title companies." The proper test of a corporation's "regular course of business," the dissenters felt, should be the business in which it is "actually engaged," not the business which its charter authorized it to carry on.

If the majority decision is followed in its broadest scope, *i.e.*, that the sole determinant of the applicability of Section 20 is the language of the corporate charter, it will have effected a sweeping change in the law. At the very least, it would seem to deprive investors in real estate corporations owning only a single property of the protection of Section 20 and would permit sale of the corporation's only asset and dissolution of the corporation over the objections of minority stockholders—action which heretofore has not been possible. Conceivably the Court may in a subsequent case elect to limit the present decision by placing predominant emphasis on the *ultra vires* nature of the business in which the instant corporation was allegedly actually engaged. Such limited reading of the present decision would, however, seem inconsistent with much of its rationale.

The dissenters' fears that the majority's "charter" test emasculates Section 20 would not, however, seem well grounded aside from single-property real estate corporations and similar situations. Even if a court's inquiry is limited to the corporate charter, it might readily be determined that a sale, although within the corporation's powers, was not in the regular course of

the corporation's business, for example, the sale of all the assets of a manufacturing corporation. It is only where the charter indicates that the primary corporate purposes were to trade generally in the properties which constitute the assets of the corporation that the problem presented by the instant case would seem to arise.

BRANDWEIN V. PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA

(3 N.Y. 2d 491, December 6, 1957)

The Court of Appeals has handed down a recent decision which further erodes the Statute of Frauds and the parol evidence rule and may well prevent summary disposition of many complaints pleading oral agreements.

In 1939, plaintiff, an insurance agent, was appointed defendant's general agent in the New York City area. Plaintiff and defendant entered into a "General Agent's Agreement" which provided for discontinuance of the agent's commissions on termination of the agreement. Plaintiff alleged in his complaint that, in the negotiations prior to execution of the agreement, he had refused to agree to this provision, insisting that his commissions be "vested," *i.e.*, that he continue to receive commissions so long as the policies remained in force, even after termination of his employment. Plaintiff further alleged that defendant had advised him that a vesting provision could not be included in the principal contract, but that defendant agreed to vesting of his commissions and would record and docket the oral "special agreement" in the corporation's official records. In reliance on this representation, plaintiff executed the agency agreement.

Thereafter, plaintiff alleged, defendant represented on several occasions that the special agreement had in fact been docketed and, in reliance thereon, plaintiff sold numerous policies. Defendant terminated the agreement in March, 1954, and refused to pay commissions accruing thereafter, denying the existence of any "special agreement." Plaintiff then sued to reform the principal agreement to include the oral "special agreement" and to recover for commissions payable under the agreement, as reformed. Defendant argued that the alleged oral agreement was unenforceable under the Statute of Frauds and, under the parol evidence rule, could not be put into evidence.

Special Term granted judgment for defendant on the pleadings; the Appellate Division, Second Department, affirmed without opinion, one judge dissenting. The Court of Appeals reversed in an opinion by Judge Desmond, Judge Van Voorhis dissenting.

The majority recognized that the complaint would not have stated a cause of action if it had alleged merely the oral special agreement. But, the majority pointed out, the complaint alleged in addition that "plaintiff's signature on the written agreement was procured from him by a fraudulent representation . . . that defendant intended to write onto its records the collateral agreement." If such writing had not been made, there was either

mutual mistake or mistake on plaintiff's part and fraud on defendant's, "the classic grounds for reformation of an instrument in equity." The rule is well settled, the majority stated, that neither the Statute of Frauds nor the parol evidence rule bars a suit for reformation.

Judge Van Voorhis dissented, contending that "the prayer for reformation is not supported by the factual allegations" and branding the complaint as "merely an attempt to evade the parol evidence rule and the Statute of Frauds." The complaint makes clear, Judge Van Voorhis stated, that defendant had advised plaintiff that it could not include the alleged oral agreement in the written contract, thus putting plaintiff on notice that the side agreement was not part of defendant's legal obligation and that plaintiff was relegated to reliance upon the "continuing good will of the defendant." There was therefore neither mutual mistake nor fraud.

The decision opens interesting avenues by which the requirements of the Statute of Frauds may be escaped. The mistake or alleged "fraud," it is to be noted, was not with respect to the substantive provisions of the agreement, but solely to the reduction of the special agreement to writing. It seems clear that the Court would have held the contract unenforceable under the Statute of Frauds if the only false representation had been that of defendant's intention to make payments under the alleged oral agreement. The representation which, the Court held, made the Statute of Frauds inapplicable and sustained the cause of action was defendant's alleged representation that it would record and docket the oral special agreement.

The impact of the decision will be substantial even if, in future decisions, it is limited to the specific fact situation here presented: reformation of a written agreement to include an alleged oral side agreement. The decision provides a basis, however, for much wider application. Implicit in the decision is the ruling that a false representation that an oral agreement will be reduced to writing constitutes actionable fraud—a conclusion which the dissenting judge in the Appellate Division explicitly reached.

If this broader interpretation is followed, a party to an oral contract might be able to circumvent the Statute of Frauds by exacting from the other party, prior to the conclusion of the oral agreement, a representation that he would make, sign and retain a memorandum of the agreement. If this representation proved false, the aggrieved party might be able to recoup his damages in an action for fraud, although barred from suing in contract.

The decision may also make difficult the summary disposition of complaints alleging oral agreements. If a plaintiff included in his complaint an allegation that he had been induced to enter the oral agreement by defendant's fraudulent representation that it would reduce the oral agreement to writing, this allegation might prove sufficient, under this decision, to prevent dismissal, certainly where, as here, the alleged oral agreement was ancillary to a written agreement and possibly even where no written agreement had been executed.

The result reached in the instant case may in part be attributable to the fact that there was evidence, consisting of certain letters from defendant to

plaintiff, indicating that a special agreement for payment of commissions had in fact been entered into. The absence of this factor may cause courts to take a more limited view in cases where it appears that the allegation is without factual basis and was pleaded for the purpose of preventing summary dismissal.

Committee Report

INTERIM REPORT OF THE SPECIAL COMMITTEE ON IMPROVEMENT OF FAMILY LAW

Some ten years ago your Committee, by a unanimous vote of the Association, was charged with the responsibility of securing the establishment by the Legislature of a non-partisan Commission to make an overall study of the laws relating to the family, including, but not limited to, marriage, separation, divorce and annulment. After some years of unrewarded effort, the purpose of the Association, and the objectives of the Committee, were well summed up by then President Seymour, when he said: "In this long and painful process of trying to let in the light, we may take some comfort in the thought that, sooner or later, to preserve the great values of family life, the State will simply have to take an objective look at the facts of family life, and then consider such changes in law as those facts require."

Two years ago, the Committee was advised that those opposing such legislation in the past had indicated their willingness to support a resolution establishing not a commission but a joint legislative committee to make a limited and narrow inquiry into the area of family law. By a closely divided vote, the Committee approved such a resolution because it felt that a study of the operation of matrimonial and family actions was long overdue, and that the Legislature would not authorize the more comprehensive study which we considered imperative. We hoped also that the Joint Legislative Committee would take full advantage of even its limited authority and make a real contribution to family law in the State.

Your President had the distinction of being the first witness to appear before the Committee when it began its hearings in this room a year ago July. Certainly not only he, but all of the other witnesses who appeared before the Committee, presented the full picture of the unhappy plight of the family whose misfortune it is to come into the New York courts today. The Committee has been attentive and sympathetic, and our hopes were raised that its labors would be productive.

The Joint Legislative Committee has presented its first report, of some one hundred and twenty-five pages, to the Legislature. That report has been carefully studied by your Committee, and I regret that our conclusions must be summed up in the one word "Disappointment." Disappointment that the Committee has not seized the rare opportunity of making a major contribution to law reform in this state. Disappointment that, instead of attempting to grapple with the major problems, the Committee has chosen to deal with peripheral problems such as those which relate to the right of a spouse of a person sentenced to life imprisonment to remarry, the right of various officers to perform marriage ceremonies, marriages performed under contract and by proxy, and to whom marriage certificates should be delivered. Dis-

appointment that, apart from Senator Periconi, the members of the Joint Committee who represent the City of New York have been conspicuously absent from the Committee's hearings and deliberations, and from participation in its work.

One of the hopes which we expressed at the time of the creation of the Joint Committee was that it would provide a mechanism for protecting the interests of minor children which might otherwise be subordinated to the selfish interests of parents. In this we were one with Presiding Justice Botein when he said: "Certainly competent inquiry should be made to place the child where its welfare and happiness will be promoted, and to put an end to the prevailing practice which generally gives the child to the successful party as a sort of prize of war. * * * No judge, no law, can step in and repair the damage already done to a child by the two people who dominate his little world. He stands frightened and impotent, and uncomprehending, in the widening breach between those two people. The erosion of the familiar and comfortable home ways eats away at his happiness and security. Often the final rupture is the kindliest surgery! It at least gives the child a fighting chance to grow roots in another and more stable environment; and it replaces the muddled and emotional decisions of his parents with a mature and selfless advocate and arbiter—the court."

The Joint Committee has recognized the need of providing additional protection for children involved in matrimonial litigation, and has said: "Assuming as we must that minor children are of vital concern to the state, it seems essential to provide the machinery to protect them where now they receive no protection or very little beyond the striving of our courts to do justice in view of the proof at hand." But the means for providing this protection which the Joint Committee has sponsored seems to us to be ineffective and improvident. The Joint Committee has proposed that in matrimonial actions where there are minor children concerned, a special guardian shall be appointed whose fees shall be payable as costs of the action. It is our belief, in which the Committee on State Legislation has concurred, that the evils which have occurred in other special guardian systems would recur here, and that a procedure enacted to protect the welfare of children might in fact become little more than a patronage vehicle. Nor do we feel that the needs of the children concerned would be as adequately met under this system as by other remedies which would make available to the courts the resources of qualified and specialized agencies, both public and private, and the services of competent and trained specialists.

We are also concerned that the Joint Committee has chosen to recommend legislation which would reduce from twenty-one to eighteen the age at which a boy might marry without his parent's consent. It is our conviction that there would be fewer matrimonial actions if the Legislature made marriage more difficult to achieve. In the licensing field, marriage is unique. To become a plumber, a barber, an embalmer, an automobile driver, or even a lawyer, one must affirmatively establish his qualifications to the satisfaction of the State. But to become a husband or a wife, all that is needed

is to make a routine visit to the City Clerk and pay two dollars. We think that the few restrictions on easy marriage should be added to, and not further weakened.

During the course of the next month, we will submit detailed reports on the various legislative recommendations of the Joint Committee. We assume that it will be continued for another year, and we hope that our comments a year from now will be more optimistic and enthusiastic.

Respectfully submitted,

RICHARD H. WELS
Chairman

January 21, 1958

The Library

CIVIL PROCEDURE

A PRELIMINARY CHECKLIST OF STATE PRACTICE LITERATURE

Alabama

Jones, Walter B. Practice and forms. St. Paul, West Pub. Co. 1947. 6v. pp. supp.

McCoy, W. P. Trial and appellate practice. Tuscaloosa, Malone Book Store.

Rules of civil procedure; final draft. St. Paul, West Pub. Co. 1957. 269p.

Arizona

Rules of civil procedure for the superior courts. St. Paul, West Pub. Co. 1955. 207p.

California

Code of civil procedure; text and index. St. Paul, West Pub. Co. 1957. 1104p.

Deering's code of civil procedure, adopted March 11, 1872. San Francisco, Bancroft-Whitney. 1955. 932p.

McBaine, James P. Trial and appellate practice—civil actions. St. Paul, West Pub. Co. 1950. 2v. pp. supp.

Owens, William B. Forms and suggestions for practice. 4th ed., incl. supp. through 1951. Stanford. 2v. 1953, 1955 supps.

University of California, Berkeley. Civil procedure before trial. State Bar. Berkeley. 1957. 978p.

Witkin, Bernard E. Procedure. San Francisco. 1954. 2775p.

Connecticut

Maltbie, William M. Appellate practice. 2d ed. Hartford, Atlantic Law. 1957.

Practice book of 1951; a compilation of rules and forms pertaining to civil and criminal actions. Hartford, State Printer. 1951. 599p.

District of Columbia

Flaherty, Paul. Practice, with forms. St. Paul, West Pub. Co. 1950. 8v.

Florida

Carson, James M. Common law pleading, practice and procedure, with forms. 3d ed. Atlanta, Harrison Co. 1940. 1301p. pp. supp.

Sapp, Alfred E. Pleading, practice and legal forms annotated. Atlanta, Harrison Co. 1952. 6v. pp. supp.

is to make a routine visit to the City Clerk and pay two dollars. We think that the few restrictions on easy marriage should be added to, and not further weakened.

During the course of the next month, we will submit detailed reports on the various legislative recommendations of the Joint Committee. We assume that it will be continued for another year, and we hope that our comments a year from now will be more optimistic and enthusiastic.

Respectfully submitted,

RICHARD H. WELS
Chairman

January 21, 1958

The Library

CIVIL PROCEDURE

A PRELIMINARY CHECKLIST OF STATE PRACTICE LITERATURE

Alabama

Jones, Walter B. Practice and forms. St. Paul, West Pub. Co. 1947. 6v. pp. supp.

McCoy, W. P. Trial and appellate practice. Tuscaloosa, Malone Book Store.

Rules of civil procedure; final draft. St. Paul, West Pub. Co. 1957. 269p.

Arizona

Rules of civil procedure for the superior courts. St. Paul, West Pub. Co. 1955. 207p.

California

Code of civil procedure; text and index. St. Paul, West Pub. Co. 1957. 1104p.

Deering's code of civil procedure, adopted March 11, 1872. San Francisco, Bancroft-Whitney. 1955. 932p.

McBaine, James P. Trial and appellate practice—civil actions. St. Paul, West Pub. Co. 1950. 2v. pp. supp.

Owens, William B. Forms and suggestions for practice. 4th ed., incl. supp. through 1951. Stanford. 2v. 1953, 1955 supps.

University of California, Berkeley. Civil procedure before trial. State Bar. Berkeley. 1957. 978p.

Witkin, Bernard E. Procedure. San Francisco. 1954. 2775p.

Connecticut

Maltbie, William M. Appellate practice. 2d ed. Hartford, Atlantic Law. 1957.

Practice book of 1951; a compilation of rules and forms pertaining to civil and criminal actions. Hartford, State Printer. 1951. 599p.

District of Columbia

Flaherty, Paul. Practice, with forms. St. Paul, West Pub. Co. 1950. 8v.

Florida

Carson, James M. Common law pleading, practice and procedure, with forms. 3d ed. Atlanta, Harrison Co. 1940. 1301p. pp. supp.

Sapp, Alfred E. Pleading, practice and legal forms annotated. Atlanta, Harrison Co. 1952. 6v. pp. supp.

Georgia

Court rules annotated. Atlanta, Harrison Co. 1955. 356p.

Emory University Law School. Bureau of Legal Research. A manual on procedure. Atlanta, Harrison Co. 1954. 570p.

Leverett, Ernest F. Procedure and practice. Emory Univ. Law School. Atlanta, Harrison Co. 1957. 889p.

Williams, Ralph R. Standard practice, with forms. Rochester, N. Y. Lawyers Co-operative. 1955. 6v.

Illinois

Clark, Harold B. Callaghan's civil practice forms. Chicago, Callaghan. 1954.

Elson, Alex. Civil practice forms. State and federal annotated for pleading, practice and procedure in state and federal courts. Indianapolis, Bobbs-Merrill. 1952. 2v.

Fins, Henry G. Revision of the civil practice act and supreme court rules. Chicago, United States Law Print. 1955. 45p.

Civil practice forms. Callaghan, Chicago. 1953–56. 8v. pp. supp.

Nichols, C. A. Civil practice. Chicago, Callaghan. 1940–42. 7v. pp. supp., 1956.

Indiana

Flanagan, Dan C. Pleading and procedure, with forms. St. Paul, West Pub. Co. 1947. 846p. pp. supp.

Thompson. Forms, pleading and practice. 2d ed. Indianapolis, Bobbs-Merrill. 1936. 3v. pp. supp. 1950.

Works, John D. Practice, pleading, procedure, forms: being a complete revision of Watson's works. 4th ed. Cincinnati, W. H. Anderson. 1952. 8v.

Iowa

Ladd, Mason and Boyd, William L. Private practice.

McCarty, Dwight G. Pleading. 2d ed. Chicago, Callaghan. 1953. 4v. pp. supp. 1955.

Messer, Frank F. Practice, by Messer and Volz. St. Paul, West Pub. Co. 1954.

Kentucky

Court of Appeals. Civil rules: practice and procedure, with comprehensive comments. St. Paul, West Pub. Co. 1954. 895p.

Court of Appeals. Rules of civil procedure. St. Paul, West Pub. Co. 1953. 218p.

Roberts, William L. Practice forms, with informative comments. St. Paul, West Pub. Co. 1953. 761p.

Russell, Absalom C. Practice and forms. Cleveland, Banks-Baldwin. 1953. 1v.

Louisiana

Code of practice. Indianapolis, Bobbs-Merrill. 1948.

McMahon, Henry G. Practice; cases and materials on modern procedure. St. Paul, West Pub. Co. 1939. 2v.

Maine

Sullivan, Francis W. Civil officer, with forms. Boston, Boston Law Book. 1950. 2v.

Massachusetts

Crane, Joseph G. Court rules, annotated. St. Paul, West Pub. Co. 1950. 859p. supp. 1957.

Dellheim, Richard B. Methods of practice. St. Paul, West Pub. Co. 1952. 902p. supp. 1957.

Mottla, Gabriel V. Practice, civil. Rev. ed. St. Paul, West Pub. Co. 1948. 716p. pp. supp.

Rodman, Robert M. Procedural forms, annotated. Rev. ed. St. Paul, West Pub. Co. 1949. 1058p. supp. 1955.

Michigan

Callaghan's civil jurisprudence. Chicago, Callaghan. 1957.

Carr, C. L. Pleading and practice. Kansas City, Mo., Vernon Law Book. 1949.

Henderson, J. M. and others. Pleading and practice, with forms. Chicago, Callaghan. 1946–49. 15v. pp. supp.

Minnesota

Black, Raymond D. Practice methods. St. Paul, West Pub. Co. 1956.

Dunnell, Mark B. Mason's Dunnell on practice, with forms. 2d ed. St. Paul, Mason Pub. Co. 1952. 2v.

Pirsig, Maynard E. Pirsig on pleading. 4th ed. St. Paul, Mason Pub. Co. 1956.

Wright's rules. Chicago, Callaghan. 1954. 475p.

Youngquist. G. Aaron and Blacik, Benjamin J. Rules practice. St. Paul, West Pub. Co. 1953. 3v.

Missouri

Limbaugh, R. H. Pleading, practice, procedure and forms. St. Louis, Thomas Law Book. 1947.

Taub, Paul. The deskbook of civil procedure. St. Louis, Lawyers Service. 1951. 2v.

Volz, Marlin M. Practice. Kansas City, Mo., Vernon Law Book. 1953.

Nebraska

Fisher, Edward C. Practice and procedure in courts of limited jurisdiction, with forms. St. Louis, Thomas Law Book. 1950. 1858p.

Nevada

Supreme Court. Rules of civil procedure to take effect January 1, 1953. St. Paul, West Pub. Co. 1952. 124p.

New Jersey

Levine, Jacob. First rule book. Assoc. Law. 1948. 64p.
Le Wine, Irwin. District court and practice. Gann. 1950. 2v. supp. 1952.
Marsh, Theodore M. Forms; a comprehensive and modern collection of procedural forms based upon the new Supreme Court rules (and other courts), with historical and other interpretative material. St. Paul, West Pub. Co. 1949. 2v. pp. supp.
Schnitzer, Morris M. New practice. Gann. 1949. 479p.
Stevenson, Harvey G. Practice and procedure. Assoc. Law. 1949–50. 3v.
Waltzinger, Frederick J. Practice. Rev. ed. St. Paul, West Pub. Co. 1953. 2v. in 4. pp. supp.

New Mexico

Rules of the district courts. St. Paul, West Pub. Co. 1949. 139p.

New York•

Bender's forms for the civil practice acts, with explanation and notes., by Bonomi. New York, M. Bender. 1937–49. 9v. supp. 1956.
Bender's forms for pleading, by Warren. New York, M. Bender. 1948. 8v. supp. 1956.
Bradbury, Harry B. Lawyers' manual; hints, suggestions, reminders, time-savers, annotated forms of civil practice. 6th ed., by Edwin M. Bohm. New York, Baker, Voorhis. 1953. 1574p.
Cahill-Parsons. Civil practice. Baker, Voorhis & M. Bender. 1955. 1957 supp.
Carmody, Francis X. Practice, with forms. 7th ed. rev., by Morris D. Forkosch. New York, Clark Boardman. 1956. 1075p. pp. supp.
Carmody Wait cyclopedia of practice. Rochester, N. Y., Lawyers Co-operative. 1952–56. 24v. annual pp. supp.
Clevenger's annual practice; containing the official editions of civil practice act, rules of civil practice, court of claims act, surrogate's court act, New York City municipal court code, New York City court act, justice court act, court rules and tables. Mount Kisco, Baker, Voorhis. 1957. 1v.
Gilbert-Bliss civil practice. ed. by Frank B. Gilbert, Austin B. Griffin and John T. Fitzpatrick. Mount Kisco, Baker, Voorhis. 1926–55. 22v. pp. supp.
Nichols-Cahill. Civil practice acts. Ann. LCP Co. 1937–57. 16v. in 18.
Practising Law Institute. Practice. 4th ed. New York. 1955. 370p.
Prashker, Louis. Practice. With Sarah Prashker. 3d ed. Brooklyn. 1954. 954p.
Rotwein, Abraham. Pleading and practice. Brooklyn. 1956. 299p.
Warren, Oscar L. Bender's practice. New York, M. Bender. 1953–56. 5v.

North Carolina

Lake, Isaac B. Practice methods. St. Paul, West Pub. Co. 1952. 837p.
McIntosh, A. C. Practice methods. 2d ed. St. Paul, West Pub. Co. 1956.

• A complete list of New York practice material will appear in a later issue.

Ohio

Baldwin's civil law, practice and forms; a complete civil manual. 6th ed. Cleveland, Banks-Baldwin. 1955. 1v.

Bates, Clement. Gardner's Bates civil practice; pleading procedure, forms. 5th ed. Cincinnati, W. H. Anderson. 1955.

Knepper, W. E. Manual of general practice. 1956. 725p.

Leyshon, Frank C. Practice manual; an analytical guide to both civil and criminal practice in all courts. 2d ed. Cincinnati, W. H. Anderson. 1956. 992p.

Weiner, S. J. Methods of practice, with forms. St. Paul, West Pub. Co. 1957. 2v.

Oklahoma

McRill, A. L. Summary of the law and complete procedural steps in trial and appellate courts. Oklahoma City. 1949.

Pennsylvania

Amram, Philip W. Procedural rules. Rochester, N. Y., Lawyers Co-operative. 4v.

Anderson, Robert A. Civil practice. St. Paul, West Pub. Co. 1950. 11v. pp. supp.

Levin, Robert. Practice. Philadelphia, Robert Levin School of Penna. Law. 1950. 126p.

Standard practice. Rochester, N. Y., Lawyers Co-operative. 1934–40. 16v. pp. supp.

South Carolina

Clay, Clarence E. Practice forms, with author's comments. St. Paul, West Pub. Co. 1952. 800p.

Tennessee

Gilreath, Sam B. Caruther's history of a lawsuit; a treatise in the courts of the state. 7th ed. Cincinnati, W. H. Anderson. 1951. 1021p.

Higgins, Joseph. Procedure in law cases. Charlottesville, Va., Michie. 1937. 1265p.

Hogg, Charles E. Pleading and forms. 4th ed. Cincinnati, W. H. Anderson. 1934. 974p.

Texas

Lowe, L. Hamilton and Archer, Evelyn Lincoln. Practice. Kansas City, Mo., Vernon Law Book. 1957. 895p.

McDonald, Roy F. Civil practice in district and county courts. Chicago, Callaghan. 1950. 4v.

Stayton, Robert W. Annotated forms. St. Paul, West Pub. Co. 1948. 3v. pp. supp.

Stayton, Robert W. Cases on civil and criminal pleadings, procedure and trial. St. Paul, West Pub. Co. 1952–53. 4v.

Supreme Court. Vernon's rules of civil procedure. Kansas City, Mo., Vernon Law Book. 1955. 4v.

Jurisprudence forms, pleading and practice, annotated. St. Paul, West Pub. Co. 1953–54. 8v.

Virginia and West Virginia

Boyd, T. M. Common law and statutory pleading and practice. 4th ed. Charlottesville, Michie. 1952. 1108p.

Kittle, Warren V. Notes on the law of rule days. Cincinnati, W. H. Anderson. 1912. 61p.

Wisconsin

Bryant, Edwin E. Pleading and practice, with forms. 3d ed. Chicago, Callaghan. 1954.

De Funiak, W. Callaghan's pleading and practice. Chicago, Callaghan. 1956.

Volz, Marlin M. Practice methods. St. Paul, West Pub. Co. 1949. 1001p. pp. supp.